4 Civil D038402

COURT OF APPEAL, STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION ONE

CLEM ABRAMS and JOHN BOHANNON, Plaintiff/Appellants, v. THE CITY OF SAN DIEGO, Defendant/Respondent,	No. 4 Civil D038402 (San Diego County Superior Court No. 655468)
MESA SHOPPING CENTER EAST, Real Party in Interest/ Respondent.	

APPELLANTS' OPENING BRIEF

(Filed Jan. 2, 2002)

On Appeal from an Order of the
Superior Court of California
County of San Diego
Hon. Wayne L. Peterson

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APPELLANTS' OPENING BRIEF

INTRODUCTION

This is the third appeal in a controversy arising from a decision by Respondent City of San Diego (hereinafter "City") to condemn a significant portion of the middle of Abrams' property for roadway purposes, in furtherance of the development plans of an adjacent property owner.

Normally, constitutional law has mandated that when a person's property is taken for public use, the public entity is required to pay just compensation. Please see, *e.g. Palazzolo v. Rhode Island* (2001) 121 S.Ct. 2448, where Justice O'Connor, in her concurring opinion, noted, at 2406:

> The Fifth Amendment forbids the taking of private property for public use without just compensation. We have recognized that this constitutional guarantee is "'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Penn Central,* [*Penn Central Transp. Co. v. City of New York*, 438 U.S. 104] *supra,* at 123-124, 98 S.Ct. 2646 (quoting *Armstrong v. United States,* 364 U.S. 40, 49, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (1960)).

The California Supreme Court in *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854 noted the following, at 876:

> One of the central promises of the takings clause is that truly public burdens will be publicly borne.

In the case of the City of San Diego, a new technique has been devised, where it takes a portion of your property through eminent domain for the roadway, paying for such through an assessment district, and then tells you that your property has been benefitted by such roadway, and forces you to reimburse it for the money it paid you for taking your property in the first instance. In essence, you surrender your property for no compensation.

This approach might make some sense in the context of road widening in a commercial area where improved access could be considered an enhancement and the condemned property is taken from the edge of the parcel so that only a portion of the roadway is attributed to any one property owner. Here, the road trisected Abrams' property, the road right-of-way was fully within Abrams' property, and City claimed Abrams is responsible for the entire cost of the road. City has sought all along to have Abrams' pay for a road they do not use and did not ask for. Surely this cannot pass constitutional muster.

As a result of the last appeal, the City was required to make a determination of proportionality of the benefit of the road construction on Abrams' property to such property, compared to the general benefit, as a means of determining the fairness of the exaction the City sought to get from Abrams.

From Abrams' point of view, the logical benchmark for proportionality is the relative number of vehicle trips generated by the land uses of the respective properties and described in the General Plan. When the matter went back to the City Council after the last appeal, instead of following this approach, the City adopted the position of Real Party, which was that "consultants" could "estimate" the

difference in fair market value before and after the project and determine proportionality by comparing that difference to the exaction.

The trial court has affirmed this purported fair market value approach, giving rise to this appeal.

STATEMENT OF THE CASE

This is a case where Respondent CITY OF SAN DIEGO ("City") cooperated with Real Party in Interest MESA SHOPPING CENTER EAST ("MSCE") in the formation of a cost reimbursement district for the purpose of enabling MSCE to fund the road and drainage infrastructure necessary to serve its pending project with the understanding that it would thereby obtain reasonable reimbursement for improvements benefitting others, such as Abrams, when and if their property ever developed. [App.-3, 4][1] Two assessments resulting in liens against Abrams' undeveloped property were made under this district, totaling over $950,000.00, [App.-3, 5] such that if Abrams sought to pull a building permit for work valued over $20,000.00, such lien would have to be paid. Abrams did not challenge those assessments. [App.-3, 5]

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[1] Abrams specifically request the Court to consider the original Reporter's Transcripts and Appellant's Appendices from the previous two Appeals, D019566 (Appeal 1) and D029343 (Appeal 2) pursuant to California Rules of Court rule 11(b). This would be considered "Appeal 3". Hereinafter, all references to the Reporter's Transcript will appear as "RT-Appeal number, page number". References to the Appellants' Appendix in lieu of Clerk's Transcript shall appear as "App.-Appeal number, page number".

This case arose because City determined to condemn a right of way for a major street right through the middle of Abrams' undeveloped property, [App.-3, 5] paid a condemnation award, [App.-3, 6] and then sought to charge the full amount of the condemnation award and expenses back in as a recorded lien against Abrams' property.[2] [App.-3, 6]

This was done on the apparent theory that if Abrams had desired to develop their property before MSCE, they would have been required to dedicate (without compensation) the same property for roadway purposes. In sum, City handed Abrams $440,000.00 over their original estimate for the right of way, and then took over $546,000.00 back through the Addendum to the Assessment, by increasing the lien on their property.

Naturally, Abrams objected, and filed this action. [App.-3, 7]

After an appeal on procedural issues having to do with the Statute of Limitations, in case number D019566, this matter was remanded to the trial court by the Court of Appeal with directions to address the administrative mandamus petition on the merits.

On June 30, 1997, the trial court entered a judgment which found, among other things,

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[2] The details are somewhat complicated because as part of the road project, some drainage improvements to the remainder of Abrams' property were completed. At the end of the day, the monies Abrams received from the City for street right of way had been recouped by the City by a commensurate lien against Abrams' remaining property. See page ___, *infra*.

> 1. There is no relevant evidence in the record of benefits to the parcel that a reasonable mind might accept as adequate to support the conclusion that there was rough proportionate benefit to the parcel; . . . [App.-3, 2]

The trial court then ordered, adjudged and decreed:

> That a peremptory writ of mandate shall issue under the seal of this court commanding respondent, the City of San Diego, including all its agencies, departments, subdivisions, officers, employees, and agents, within the time specified for a return to the writ to demonstrate a factually sustainable proportionality between the effects of the increased costs of $545,251.18 assessed through the Cost Reimbursement District on June 23, 1992, and the exaction. [App.-3 3, 2]

MSCE appealed, and in case number D029343, the Fourth District Court of Appeal, Division One, affirmed, holding, among other things,

> To impose a cost reimbursement lien on Abrams's property, the City must prove that an essential nexus exists between the assessment and the benefit of public improvement and that the amount of the assessment is roughly proportional to the benefit to the property of the street improvement. Because there is no evidence of proportionality, the trial court correctly determined that insubstantial evidence supported the action by the city council. [App.-3, 13]

On June 19, 2000, City held its regular meeting, which included, as item 205, "Addendum to the Mesa Shopping Center East Cost Reimbursement District Agreement" with a City Manager's recommendation to

adopt a resolution "[r]e-affirming that a factually sustainable proportionality exists between the June 23, 1992 amendment to the Mesa Shopping Center East Cost Reimbursement District and the benefit to the Abrams/ Bohannon property." [App.-3, 422]

Abrams were allowed a **mere two minutes** on the record, the transcript of which only takes up two pages, [App.-3, 425-427] and City adopted the resolution, [App.-3, 597] based on a report from a "public finance consultant," which included a purported engineering analysis and an appraisal of the land. [App.-3, 464-596]

Abrams' then timely filed a Supplemental Petition, [App.-3, 18] which was denied. [App.-3, 676, 677-78]

This Appeal timely followed. [App.-3, 680]

STATEMENT OF APPEALABILITY

The "ORDER DENYING PETITIONERS' SUPPLEMENTAL PETITION FOR WRIT OF ADMINISTRATIVE MANDAMUS" entered March 30, 2001 is a final judgment of the Superior Court specifically made appealable by Code Civ. Proc., § 904.1(a)(1).

STATEMENT OF FACTS

This is a case where Abrams, owners of nine acre parcel of property in the Mira Mesa area of the City of San Diego, had the misfortune to be located directly adjacent to a 23.8 acre parcel owned by MSCE.

Abrams had no present intention of developing their property. MSCE, on the other hand, had immediate intentions to subdivide and develop its property, and in

furtherance of that goal sought to obtain approval of a subdivision map.

Part of the subdivision map review process involved an analysis of the on site and off site physical improvements required for the project. In this case, City officials determined that Mira Mesa Boulevard needed to be widened, Galvin Avenue needed to be widened, and a new street, ultimately called Westview Parkway, needed to be constructed.

MSCE obtained approval of its tentative subdivision map with a number of conditions which included the improvements to Mira Mesa Boulevard and Galvin Avenue, and the construction of Westview Parkway.

When the project was proposed, there were two potential alignments for Westview Parkway and Galvin Avenue. One followed the property line between Abrams' and MSCE's respective properties, and the alternate would be largely on Abrams' property, consuming approximately two of the nine acres, and cutting Abrams' property up into three pieces, one of which would abut MSCE's property, and another of which would be virtually useless because of its small size. [App.-2, 128]

The record contains no evidence as to why the alternative alignment was selected, but as this matter has evolved, a significant reason has become apparent.

The City of San Diego has developed a pattern of circumventing the eminent domain process for the acquisition of private real property for public use in exchange for just compensation, as contemplated in Title 7 of the California Code of Civil Procedure, sections 1230.010, *et seq.*, by either requiring dedications, or, if the person or

entity from whom the property is to be taken is not a current applicant for permission to develop, by proclaiming that the property is "benefitted" by the development such that an assessment lien can be placed upon it.

In this case, the vehicle for the creation of the aforementioned assessment lien was a "cost reimbursement district," pursuant to which the City of San Diego required that the developer, MSCE, "front" the cost of the improvements, including Westview Parkway and Galvin Avenue, with the understanding that Abrams and other property owners in the area would be required to "reimburse" MSCE for a portion of those costs. These reimbursements, hereinafter referred to as "exactions" would be in the form of liens on the properties, payable if any development application over $20,000.00 were submitted at any time within the next twenty years.

An additional aspect of the policies of the City of San Diego is that somewhere along the line a custom evolved, which was that it could be assumed, without further analysis, that any property that suffered a condemnation of any portion thereof for road improvements was "benefitted" by the portion of the road improvements located on that property. One could reasonably speculate this "assumption" arose from, among other things, the case of *White v. County of San Diego* (1980) 26 Cal.3d 897,[3] wherein the Supreme Court upheld an assessment against

[3] As this Brief will demonstrate, the validity of City's interpretation of the *White* case should, by now, be in serious doubt, given the holdings in *Dolan v. City of Tigard* (1994) 512 U.S. 374, *Nollan v. California Coastal Commission* (1987) 483 U.S. 825, and *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854.

property owners on either side of Mission Gorge Road for improvements to the road consisting of widening and the installation of medians and signals. In that case, the Supreme Court specifically approved of an approach which surcharged those properties whose frontages were taken by condemnation but did not charge those properties whose owners dedicated their frontage strips.

Unfortunately, somehow officials of the City of San Diego and the land use development consultants who work with them allowed the holding in *White* to be translated into a "rule of thumb," hereinafter referred to as the "unfounded allocation presumption," that if real property was condemned for road purposes leaving a remainder parcel, the remainder parcel was "benefitted" to the extent of the cost of the condemnation, and the proportion of the cost allocable to the remainder parcel was that represented by the portion taken compared to the portion taken from the adjoining property.

Put another way, if the center of the new road goes down the property line between two properties, they share the cost equally, but if the road is fully on the property of one property owner, going down the edge adjacent to the other property, the property owner upon whose property the road is built bears the entire cost of site acquisition and development. This approach is not only illegal generally, but, as will be shown herein, is in direct violation of the City Council's own policy 200-1 [App.-2, 1], discussed in more detail, *infra*.

Earlier MSCE took the position that the aforementioned "unfounded allocation presumption" results in the "proportionality" required by the Fifth Amendment of the United States Constitution as described in *Dolan v. City of*

Tigard (1994) 512 U.S. 374, *Nollan v. California Coastal Commission* (1987) 483 U.S. 825, and *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, such that no further demonstration of proportionality need be made.

In this case, that meant that if MSCE was shrewd enough to cause the alignment of Westview Parkway and Galvin Avenue to veer entirely onto Abrams' property, MSCE could avoid having to pay for Westview Parkway and Galvin Avenue and save the other property owners in the cost reimbursement district from sharing in this expense. The City of San Diego cooperated fully with MSCE's plan, in violation of its own policy, number 200-1. [App.-2, 1]

In connection with MSCE's development, the MESA SHOPPING CENTER EAST COST REIMBURSEMENT DISTRICT NO. 4045 ("the DISTRICT") was purportedly formed and implemented in 1990 pursuant to San Diego Municipal Code §62.0208. [App.-3, 382, 406] This process generally permits the first developer of property to fund the construction of public improvements benefitting not only that property, but other adjoining property and to secure a claim for proportionate reimbursement from other benefitted owners, if and when they develop.

Much earlier (under different circumstances) something called the "EIGHT OWNERS AGREEMENT" for sharing the costs of public improvements in eastern Mira Mesa among eight private landowners (including Abrams), was approved by the City Engineer on May 15, 1985. (Only a portion of this document is in the Administrative record [App.-3, 475-80]) This agreement allocated one-quarter of the offsite improvement costs to Abrams, [App.-3, 478, item 9] **but contemplated a situation where Westview**

Parkway went along the side of Abrams' property. At the time of formation of the DISTRICT, the estimate of Abrams' share was $570,948.00. [App.-3, 442] Although Abrams objected to the formation of the DISTRICT, they did not object to this assessment.

Once the project was underway, MSCE and City decided that Westview Parkway and Galvin Avenue should be entirely within the confines of Abrams' property, resulting in a division of the property into two small parcels and one larger parcel. In July of 1990, MSCE requested that additional costs be charged to Abrams' property, increasing their total cost to $998,299.00. [App.-3, 382] Abrams also did not object to this first amendment, which included a budget for $200,750.00 for acquisition of right-of-way across Abrams' property, and a budget for the installation of a major storm drain across Abrams' property.

The effect of this was that the cost reimbursement district was formed, and "exactions," in the form of liens placed on Abrams' property were made, first in the amount of $570,948.00 and then increased to the total amount of $998,299.00. Abrams tolerated these first two exactions.

Abrams had not been seeking to develop their property, so City could not use its usual tactic of requiring dedication of the road right-of-way as it passed Abrams' property.[4] The only way City could obtain the right-of-way of Westview Parkway and Galvin Avenue that would

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[4] Such a dedication would not have passed constitutional muster in any event, given the ultimate alignment the CITY chose for the road, which was entirely inside the property and consumed approximately 25% of its area.

occupy 25% of Abrams' property, in a time frame suitable to MSCE, was to condemn it. This condemnation was fully litigated, resulting in an award of $641,358 to Abrams. [App.-3, 443]

In June 1992, City held a hearing on the increased cost and its allocation among the Abrams. Abrams opposed the proposed increase by letter and at the hearing. At the hearing, Abrams sought a continuance which was denied, and, after a fifteen minute presentation, the city council, with one dissenting vote, approved the third cost reimbursement assessment against Abrams. [App.-3, 443-44]

Abrams therefore sought a Writ of Mandate, for the purpose of causing City Council to conduct a full and fair hearing as to the issue of whether Abrams were being liened to an extent disproportionate to the benefit their property obtained from the improvements that are the subject of the "cost reimbursement district." [App.-3, 444]

Ultimately, the trial court disagreed with City's approach as to proportionality, ruling that it was up to City of San Diego to demonstrate a factually sustainable proportionality between the effects of the increased costs of $545,251.18 assessed through the cost reimbursement district on June 23, 1992 and the exaction with which Abrams had taken issue. [App.-3, 444]

MSCE appealed, and this Court affirmed that determination, in case number D029343. [App.-3, 452]

The effect of the Opinion in D029343 was that City Council would be required to hold a proper hearing on the question of the proportionality of the benefits related to the exaction, so as to create a record permitting judicial review of that question, if necessary.

The Opinion stated, at 11:

> To impose a cost reimbursement lien on Abrams's property, the City must prove that an essential nexus exists between the assessment and the benefit of public improvement and that the amount of the assessment is roughly proportional to the benefit to the property of the street improvement. Because there is no evidence of proportionality, the trial court correctly determined that insubstantial evidence supported the action by the city council. [App.-3, 450]

City then scheduled another hearing on the question of the third exaction, Abrams specifically took issue with the question of proportionality, requesting a continuance so that they could have experts present a more appropriate description of proportionality. [App.-3, 396, 457-59] This request was granted.

On June 19, 2000, the City Council held its regular meeting, which included, as item 205, "Addendum to the Mesa Shopping Center East Cost Reimbursement District Agreement" with a City Manager's recommendation to adopt a resolution "[r]e-affirming that a factually sustainable proportionality exists between the June 23, 1992 amendment to the Mesa Shopping Center East Cost Reimbursement District and the benefit to the Abrams/Bohannon property." [App.-3, 422]

Abrams were allowed **two minutes** on the record, the transcript of which only takes up two pages, [App.-3, 425-27] and City adopted the resolution, based on a report from a "public finance consultant," (the "Fournier Report") which included a purported engineering analysis and an appraisal of the land. [App.-3, 464-596] The Fournier Report contained a purported "benefit analysis" involving

only Abrams' property, which concluded with the opinion that the value of Abrams' property had risen based on the "improvements" hence had been benefitted. [App.-3, 471-74]

City's consultant noted that this condemnation award was $440,000.00 more than the budget as of the first amendment. This consultant, Fournier, then sums up what City did:

> Accordingly, on April 20, 1992, the cost reimbursement engineer, Wildan Associates, prepared and submitted its report regarding the final cost of improvements and right-of-way acquisition, and proposed spreading the costs that had increased from that which was estimated at the time of the first amendment to the cost reimbursement district. It had by that time been determined that the cost of right-of-way acquisition, including attorney's fees and other litigation expenses, was $696,905.66, of which $641,358 was the right-of-way compensation agreed to be paid and actually paid to the owners of the Abrams/Bohannon parcel. This represented a total increase of $496,000 from the estimate for right-of-way acquisition costs which was used at the time of prior amendment to the reimbursement district. **This *entire amount*, together with approximately $49,000 of the increase in overall improvement costs experienced by the district, was then assessed to the Abrams/Bohannon parcel by an amendment to the district passed by the City Council on June 23, 1992.** [App.-3, 467-68, emphasis added.]

At the June 19, 2000 hearing, the additional lien was approved with no record whatsoever containing an actual

demonstration of any sort of calculation regarding proportionality as between the various properties benefited by the Westview Parkway and Galvin Avenue improvements. [App.-3, 424-30]

Abrams therefore filed a Supplemental Petition for Writ of Mandate, [App.-3, 18] seeking to have the trial court tell City that it had used the wrong standard. The trial court denied the Supplemental Petition, holding:

> The Court of Appeal's Opinion does not require a calculation of the traffic that petitioners' parcel might someday generate. The better way to identify benefit is to determine what a willing buyer would pay for the property before and immediately after the improvements were constructed, as the City has done. Using this standard of proportionality, the record establishes a substantial evidence of proportionality. (See City's points and authorities, 18:15-19:7.) Nor has a procedural due process violation been shown. (City's points and authorities 19:22-20:4.) [App.-3, 676, 677-78]

This Appeal timely followed. [App.-3, 680]

I. REGARDLESS OF THE STANDARD OF REVIEW, REVERSAL IS APPROPRIATE BECAUSE THERE WAS AND IS **NO EVIDENCE** THAT RESPONDENT CITY ENGAGED IN AN ACTUAL ANALYSIS OF PROPORTIONALITY.

A. *The substantial evidence standard of review was stated as law of the case, but "heightened scrutiny" is required.*

The Court of Appeal Opinion in case number D029343 describes the applicable standard of review this way:

> The right to control the use of one's own property is one of the most fundamental rights in this country. (See *Dolan* [*Dolan v. City of Tigard*], *supra*, 512 W.S. at p. 393 [the "right to exclude others is 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.' [Citation.]"].) However, the cost reimbursement lien does not limit his ability to use the property, but rather impacts his economic interests. Thus, the trial court properly applied the substantial evidence standard for review of the administrative record, as do we on appeal. [App.-3, 379-80]

Although the Court of Appeal Opinion in D029343 mentions *Ehrlich v. City of Culver City*, *supra*, 12 Cal.4th 854, it does not refer to this bit of analysis in the case, at 876:

> Nonetheless, we reject the proposition that *Nollan* and *Dolan* are entirely without application to monetary exactions. When such exactions are imposed – as in this case – neither generally nor ministerially, but on an individual and discretionary basis, we conclude that the **heightened standard of judicial scrutiny** of *Nollan* and *Dolan* is triggered. (Emphasis added.)

In sum, the true standard of review is heightened scrutiny, particularly where, as here, the exaction occurred **entirely in the absence of any development project application on the part of Abrams.**

B. *City had no evidence whatsoever of proportionality and did no actual analysis of proportionality in confirming the third exaction.*

Here, there was no evidence whatsoever regarding proportionality of benefit between the properties affected by the Cost Reimbursement District, Abrams' property, and the general public, except that offered by Guy Winton with respect to vehicle trips across Westview Parkway and Galvin Avenue [App.-3, 456] which the trial court declined to consider:

> The Court of Appeal's decision does not require a calculation of the traffic that petitioners' parcel might some day generate. [App.-3, 676]

The gist of the consultant's report as adopted by the City Council and accepted by the trial court was that since it appeared that the fair market value of Abrams' property had increased in value after the improvements by an amount in excess of the allocated cost represented by the three exactions, proportionality had been achieved.

The trial court bought this view, without explaining how one can determine proportionality without a comparison.

The record is devoid of any evidence that the City Council considered the proportionate benefit to Abrams' property against that of the adjacent properties and the general public in approving the exactions. The trial court was, erroneously, unconcerned with this omission, apparently believing that a comparison of opinions of value of

Abrams' property "before and after" alone by one appraiser was sufficient. [App. -3, 503-86] It should not be.[5]

> C. *The only relevant evidence in the record, which the City Council and trial court apparently did not consider, relative vehicle trips, did not support any increase in the exaction.*

Fournier, the consultant hired by City to support its position, offered conclusions in its report to City, none of which described a formula for "rough proportionality," but which, distilled to their essence, say:

- Abrams would have had to dedicate in fee 25% of their property for right-of-way if they had decided to develop first, without acquisition cost to City[6];
- If it is rezoned to the highest possible zoning, the value of Abrams' property has been enhanced at a lesser total cost than if Abrams had sought to develop first;
- The appraisal indicates that the value of Abrams property has increased because of the improvements; and
- "The increase in the assessment to the Abrams/Bohannon parcel to reflect the **increase in the cost of right-of-way acquisition was directly related to the expected impact of development of the Abrams/Bohannon parcel**, and the benefits that parcel received as reflected by the parcel's resulting

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[5] As an aside, it should be noted that this "enhancement in value" is ephemeral in any event, because the exactions would exist as a lien, which would come right off the top of any actual sale transaction for Abrams' property.

[6] This result was premised on an arbitrary CITY rule which predated the *Nollan-Dolan* doctrine, discussed in detail *infra*.

> increased market value which exceeds the total assessment." [App.-3, 464-74][7]

Abrams submits that this approach to "proportionality" is neither logical, nor consistent with the Court of Appeal Opinion in D029343, which states, at 11:

> To impose a cost reimbursement lien on Abrams's property, the City must prove that an essential nexus exists between the assessment and the benefit of public improvement and that the amount of the assessment is roughly proportional to the benefit to the property of the street improvement. [App.-3, 450]

It should be borne in mind that these "assessments" were not the product of any effort by Abrams to develop their property, but rather were based solely on MSCE's development efforts. This is perhaps the most extreme case yet of a violation by local government of the plain mandates of *Nollan v. California Coastal Commission*, *supra*, 483 U.S. 825 and *Dolan v. City of Tigard*, *supra*, 512 U.S. 374.

Fournier's conclusionary, misguided analysis was in sharp contrast to the report submitted by Abrams' expert Guy Winton, a Registered Civil Engineer. Mr. Winton pointed out significant flaws in the Fournier report, including:

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[7] This is the approach erroneously approved by the trial court in its latest decision. Instead of comparing the relative level of use of the street between the various properties and then allocating cost based on that use, the "consultant" merely opined that the property was more valuable with the street than without it, hence "no harm, no foul."

- It ignored the relative traffic impact of Abrams' property, even if built out to City's highest estimate of 87 dwelling units, which would account for 2.8% or less of the traffic on Westview Parkway. [App.-3, 456]

- It erroneously relied on the "EIGHT OWNERS AGREEMENT," which was based on a 50-50 split of right-of-way for Westview Parkway between Abrams and MSCE resulting in a 25% share of cost to Abrams, but thereafter, **the entirety of the right-of-way was shifted to Abrams' property.** Because of this, the "EIGHT OWNERS AGREEMENT" cannot support a "rough proportionality" analysis at all. [App.-3, 457]

- It failed to note that the San Diego Unified School District now owns one of the small parcels, which is a further modification of the "EIGHT OWNERS AGREEMENT." [App.-3, 458]

- It failed to recognize that the second amendment **devalued** Abrams' property, rather than increasing its value. [App.-3, 460]

The bottom line is that there was no demonstration of a "rough proportionality" between the third assessment contained in the second amendment and the public impact of development of Abrams' property, but rather the bald (and erroneous) assumption that Abrams' property was enhanced in value in excess of the assessment, hence the lien was proper. That is not "proportionality" in any sense, **particularly where Abrams did not ask for the improvements and had not sought to develop their property**. Assuming, without conceding, that enhancement in value was an appropriate benchmark, unless the enhancement in value to all other properties served by Westview Parkway was also calculated, and they were all compared, there is no hint of "proportionality."

When one compares the 696 Average Daily Trips[8] that would be attributable to the 87 maximum residential units on Abrams' property, [App.-3, 456] with the 25,000 Average Daily Trip cap, and the 8,000 existing Average Daily Trips as of April, 1998, [App.-3, 456] the idea that 696 trips, which are, per the record, 8.7% of current, and 2.8% of projected trips should account for 100% of the right-of-way cost is absurd.

To put it another way, under the Court of Appeal opinion in case number D029343, which is now law of the case, it was up to City to divide (or "proportion") the exaction represented by the second amendment (the third exaction) between Abrams and other owners (and users) based on the relative impact of their respective development potentials on the use of the improvements. The record reflects no such comparison at all. If there had been such a comparison, there would have been no additional increment attributable to Abrams' property, as the first amendment had already allowed over $200,000.00 for right-of-way, and 2.8 to 8.7% of the $696,905.00 total cost would have been $19,513.34 to $60,630.74.[9]

An example of how "summary" this "evidence" is may be found at App.-2, 302, the 1992 "Project Description" where the allocation of Westview Parkway costs is described:

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[8] Average Daily Trips per Dwelling Unit times the number of expected dwelling units (or other users) is the fundamental yardstick for design of circulation systems in City.

[9] Even the Rick Engineering Estimate mentions 7.9% of Westview Parkway and 1.6% of Galvin Avenue as the shares attributable to Abrams' property. [App.-3, 482-501]

> Westview Parkway is a north-south four lane major street connecting Mira Mesa Boulevard with developments to the north. The portion of Westview Parkway connecting Mira Mesa Boulevard with Galvin Avenue was constructed by Mesa Shopping Center East. [Appellant herein] The cost for the construction of Westview Parkway as outlined in the "Eight Owners" agreement is to be shared in a proportion of 75 percent to Mesa Shopping Center East and 25 percent by the adjacent property commonly referred to as the "Abrams" site.
>
> The cost split of 75 percent and 25 percent was based on the original alignment determined to occupy 75 percent of the Mesa Shopping Center East property and 25 percent of the Abrams site. A new alignment for this section of street was approved and constructed. **This new section of street was constructed on Abrams property alone, thus Abrams will bear the total difference in construction cost between the original and the new alignment as shown below**. (Emphasis added.)

[Thus, with less than 3% of the projected trips in the future, the consultant says it is fair for Abrams to be saddled with the entire burden – preposterous!]

What the record **does** reflect is the fact that counsel for Abrams attempted to obtain time to discuss the concept of proportionality before the City Council, and was restricted to two minutes, resulting in a two page hearing transcript.

D. *Continued use of the unfounded allocation assumption violates the City of San Diego's very own "Council Policy" and conflicts with this Court's earlier decision.*

"COUNCIL POLICY," number 200-1, referring to "Distribution of Street Improvement Costs," was effective 8-13-79.[10] [App.-2, 1]

Section 1.a. thereof states, in pertinent part:

> a. that portion of the street system which provides for local traffic movement and access to abutting property should be the responsibility of the Abrams who receive the benefit.
>
> Streets which facilitate the movement of through traffic, or serve in a collector function, are of benefit to the general area, and this community should share in the cost. . . .

Section 2 describes the general responsibility of an "abutter."

> *Abutter*. Abutting property is responsible for improvements of local streets, or for that portion of collector and arterial streets which is equivalent to the width of a local street.
>
> This responsibility is up to a 40' curb-to-curb with in a 60' right-of-way providing two 12'

[10] The Court's attention is respectfully invited to the fact that this policy predates *Dolan v. City of Tigard*, *supra*, 512 U.S. 374, *Nollan v. California Coastal Commission*, *supra*, 483 U.S. 825, and *Ehrlich v. City of Culver City*, *supra*, 12 Cal.4th 854, and cries out for review in light of these changes in the law.

> travel lanes and two 8' parking lanes in residential and commercial areas, . . . Such improvements include right-of-way, grading, drainage structures, curbs, sidewalks, paving and landscaping. . . .

The balance of the policy indicates that other expenses are to be borne by the community.

Here, it appears from the report provided to the City Council for the hearing which resulted in this action [App. 298] that the entire cost of the portion of Westview Parkway taken from Abrams, including acquisition, as well as costs related to the portions of Galvin Avenue taken from Abrams, was allocated to Abrams, with no allocation to either any other property in the cost reimbursement district, or, perhaps more importantly, the actual community benefitted by Westview Parkway and Galvin Avenue, as required by the City's own Council Policy. [App. 2] This was wrong for two reasons:

1. Both of these thoroughfares are four lane, hence even under Council Policy, the cost should have been allocated between the abutter and the community at large; and

2. In any event, application of the unfounded allocation presumption violates the policy, at 1.a., that the cost should be allocated among the Abrams who receive the benefit of the street, since it presumes that the only property owner benefiting from the street is the "abutter."

Because the minimal "evidence" in the record described violation of the City Council's own policy, the trial court was wrong when it decided that identification of benefit through theoretical enhancement in gross market value of Abrams' property (alone) before and immediately

after the enhancements justified a finding of proportionality.

It makes no sense to say that 100% is "proportional," yet that is the ultimate effect of the trial court's ruling.

II. AS A MATTER OF LAW, THE "ASSUMPTION" OF "PROPORTIONALITY" USED BY THE CITY WAS LOGICALLY INCORRECT AND IN DIRECT VIOLATION OF THE RULE DESCRIBED BY *DOLAN*, *NOLLAN*, AND *EHRLICH*.

A. *An assumption of proportionality that allocates all costs of street right-of-way acquisition and improvement to the landowner from whom the right-of-way is acquired is unconstitutional.*

As noted above, Council Policy 200-1 was effective August 13, 1979. [App.-2, 1] *White v. County of San Diego*, *supra*, 26 Cal.3d 897 was decided in 1980.

As the Court has already noted in its Opinion in the earlier appeal, number D019566, [App. 787-804] *Nollan v. California Coastal Commission*, *supra*, 483 U.S. 825, *Dolan v. City of Tigard*, *supra*, 512 U.S. 374, and *Ehrlich v. City of Culver City*, *supra*, 12 Cal.4th 854, all bear on the issues of this case.

All of these case were decided after implementation of Council Policy 200-1 [App.-2, 1] and after the State Supreme Court's decision in *White*.

Discretionary permit conditions that exact money or real property from landowners present "an inherent and heightened risk that local government will manipulate the police power to impose conditions unrelated to legitimate

land use regulatory ends. . . ." (*Ehrlich v. City of Culver City*, *supra*, 12 Cal. 4th 854, 869.) To assure that a discretionary permit exaction is related to legitimate regulatory ends, the government entity must demonstrate an "essential nexus" between the state interest and the permit condition, and a relationship of "rough proportionality" between the exaction and the public impact of the proposed land use. (*Dolan v. City of Tigard*, *supra*, 512 U.S. at p. 391; *Nollan v. California Coastal Commission*, *supra*, 483 U.S. at p. 837; *Ehrlich v. City of Culver City*, *supra*, 12 Cal. 4th at pp. 869-874.)

In *Nollan*, the United States Supreme Court invalidated a coastal development permit conditioned upon the landowners granting a public easement across their beachfront property. (*Nollan v. California Coastal Commission*, *supra*, 483 U.S. at pp. 827-842.)

The High Court found an "essential nexus" must exist between legitimate state interests and the exacted condition. (*Ibid.*) The court found no such nexus between the state interest in preserving roadside ocean views and an easement allowing the public to walk across the landowners' property. (*Id.* at pp. 836, 838-842.)

In a more recent case, the United States Supreme Court found a nexus between state interests in flood prevention and traffic alleviation and a city's development permit conditions requiring a landowner to dedicate some of her commercial property for storm drainage and a pedestrian/bicycle pathway. (*Dolan v. City of Tigard*, *supra*, 512 U.S. at pp. 387-388.) But a nexus alone is not sufficient; there must also be a "'rough proportionality'" between the exaction and the public impact resulting from the proposed development. (*Id.* at p. 391.) In *Dolan*, the city failed to demonstrate that the demanded public

floodplain easement was required for flood control, or that the demanded pathway was likely to offset traffic congestion created by the landowner's property development. (*Id.* at pp. 392-395.)

Our Supreme Court recently held that the *Nollan-Dolan* doctrine heightened standard of scrutiny applies to possessory and monetary discretionary exactions alike, and invalidated a zoning permit for construction of condominiums conditioned upon the landowner's payment of $280,000 to mitigate the loss of city land previously used for recreational facilities. (*Ehrlich v. City of Culver City, supra*, 12 Cal. 4th at pp. 859-863, 881.) The exaction failed the "rough proportionality" test because the city made no "individualized findings to support the required 'fit' between the monetary exaction and the loss of a parcel zoned for commercial recreational use." (*Id.* at p. 883.)

The argument by City and MSCE that relief from a dedication requirement is a special benefit to Abrams' parcel that is proportional to the right-of-way acquisition costs shows just the attitude that connects up the *Nollan* and *Ehrlich* cases.[11] The current state of the **law** is *not* that requiring dedications as a condition of project approval is *per se* legal. The City of San Diego has just not caught up to the development of the law in this regard. *Nollan v. California Coastal Commission, supra*, 483 U.S. 825 specifically stands for the proposition that dedications *cannot* be arbitrarily exacted as a condition of permit approval. That being the case, how can relief from a

[11] Again, noting that there was **no** proportionality because 100% of the acquisition cost of the relevant portion of Westview Parkway and Galvin Avenue was allocated to Abrams' property.

"dedication requirement" that is illegal in the first instance be a "benefit?"

Abrams submits that all of these cases have properly described the responsibility of government to Abrams to avoid exactions that are not "roughly proportional" to the public impacts resulting from their specific project.

What that means in this case is that the City of San Diego should not only stop using the unfounded allocation presumption as a means of taking people's property without compensation, which is what would have occurred in this case, but also make "some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." (*Ehrlich v. City of Culver City, supra*, 12 Cal. 4th at pp. 873.)

B. *MSCE's argument that the second additional exaction was pursuant to a previously approved formula is not accurate.*

MSCE previously took the position that there was something it calls the "Eight Owners" agreement, citing Appellant's Appendix pages 300 and 302, which is a summary which refers to the agreement but is not the agreement itself.

More important than the fact the agreement was not in the record before the trial court is the fact that even under MSCE's own description of the agreement, the ultimate allocation of Westview Parkway and Galvin Avenue is inappropriate.

MSCE asserts, at page 12 of its Opening Brief, that under the "Eight Owners" agreement, Abrams agreed to bear 25% (twenty-five percent) of the cost of Westview

Parkway. (Note: According to the record, this agreement was entered into in 1985, five years before Westview Parkway and Galvin Avenue was [sic] realigned to veer through the middle of Abrams' property rather than following its western boundary. [App. 300]) Abrams then assert that simply because ultimately 75% of Westview Parkway was built on Abrams' property that the 25% commitment should be changed into a 75% commitment. This assertion is made with absolutely no reference to any evidence in the record that Abrams agreed to it.

It appears that the preparers of the April 1992 report [App. 298] made the same leap. There is simply no evidence to support this assumption, which is neither logical nor fair.

In fact, if one reads the documentation supporting the first exaction, one sees a description of numbers that fit approximately 25% of the final cost of the right-of-way being attributed to Abrams' property. There is simply no basis in fact, much less in the record, for any assumption that Abrams agreed to allow the City a "blank check" with regard to Westview Parkway and Galvin Avenue.

C. *MSCE's Special Assessment Lien analogy is inaccurate.*

MSCE argues that the cost reimbursement lien is similar to a special assessment lien. Although the mechanics may be similar, this analogy is inappropriate, specifically because a normal special assessment lien is the product of the creation of a district where some attention is paid to proportionality as between the amount of the assessment and the benefit of the project on the parcel assessed.

Special assessments are charges imposed on owners of particular parcels of real property to provide specific, direct and special benefits to the properties proportional to the benefits derived, beyond those enjoyed by the general public. (*Knox v. City of Orland* (1992) 4 Cal. 4th 132, 141-142; *San Marcos Water Dist. v. San Marcos Unified School Dist.* (1986) 42 Cal. 3d 154, 161-162.) They "identify the benefit which the public improvement will render; . . . determine if the Abrams will receive a benefit different from that of the general public; and . . . ascertain if the formula on which the assessments are made is based on the benefit received." (*Harrison v. Board of Supervisors* (1975) 44 Cal. App. 3d 852, 857.)

Please see also *Furey v. City of Sacramento* (1979) 24 Cal.3d 862, 874:

> We made it clear in the *Agins* [*Agins v. City of Tiburon* (1979) 24 Cal. 3d 266] case, however, that a land-use regulation may not be applied to one otherwise subject to it if to do so would result in a taking of property without just compensation. And as the United States Supreme Court said in *Norwood v. Baker* (1898) 172 U.S. 269 at page 279 [43 L. Ed. 443 at p. 447, 19 S. Ct. 187], **"the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking under the guise of taxation of private property for public use without compensation.**" (See also *Spring Street Co. v. City of Los Angeles* (1915) 170 Cal. 24, 30 [148 P. 217]; *Harrison v. Board of Supervisors* (1975) 44 Cal. App. 3d 852 [118 Cal. Rptr. 828].) (Emphasis added.)

In this case, the trial court earlier wisely recognized that the approach of condemning real property for street right-of-way and then assessing back the costs of such right-of-way to the very property owner from whom the land is taken is wrong, without some assessment of proportionality. Later, somehow, the trial court's wisdom dissipated.

The record remains totally devoid of any indication of any meaningful review and determination of proportionality as to Westview Parkway and Galvin Avenue, as between Abrams' property, the properties of MSCE and others nearby, and the general public. Without such review, the goal of proportionality could never be realized, and apparently will not be realized in this case, absent reversal.

III. ABRAMS WAS SORELY PREJUDICED BY THE TRIAL COURT'S REFUSAL TO FORCE CITY TO MAKE A TRUE CALCULATION OF PROPORTIONALITY.

The 2000 public hearing on this matter, [App.-3, 424-430] illustrates, just as the previous one did, many of the weaknesses of determination of detailed matters before a busy, pre-occupied City Council – and worse.

The record reflects arbitrary time limits which insured lack of understanding. In response to Abrams' request for more time, the Presiding Officer curtly denied the request. [App.-3, 425 (" . . . Noted, but your two minutes have started.")]

Two minutes for Abrams after eight years and two appeals!

References to the previous council decision which resulted in the Writ of Mandate upheld by the Court of Appeal went unheeded.

In 1992, Councilwoman Wolfsheimer captured the essence of the political issue with her last comment preceding the prior vote:

> Wolfsheimer: "I still want to know why Pardee doesn't pay for the road they built. Oh, well." [App.-2, 411]

While it didn't affect his vote, Councilman Roberts, perhaps inadvertently, put the true essence of this matter on the record (and supplies the context to Councilwoman Wolfsheimer's Pardee remark):

Roberts:	"The road that was put in was required under the join –, under the community plan, irrespective of what the nature of the developments were on either side of it. Is that correct?
Male Voice:	I have to assume that, sir.
(Staff)	My recollection and from way back was that indeed was the fact, and it's serving that whole area up in back with the direct access off of Mira Mesa [Boulevard] as opposed to using Black Mountain Road. Isn't that. . . . ?
Male:	Correct.
Roberts:	Yeah, I mean, that's what's setting the width of that is, is it's not just going in for these two developments, it's serving a whole area,

> but in fact it's the developments that adjoin in that road that bear the burden of the cost. [App.-2, 409-410]

Thus, we have as near as one could hope to get in a public hearing *an admission*, by an earlier council that there is no relationship between the demand created – in this case by some future, yet unformalized, private development, on what is now three irregular parcels on the remaining 7 acres and the immediate public improvement of a four lane major street with extensive landscaping. In connection with Councilwoman Wolfsheimer's Pardee remark, it doesn't take a rocket scientist nor a highly paid political consultant to conclude that Pardee is expected to be one of the major residential developers of "that whole area up in back" as Councilman Roberts calls it.

This is borne out by the aforementioned Average Daily Trip analysis, which puts Abrams at 696 Average Daily Trips out of the estimated 8,000 to 25,000 total Average Daily Trips.

By the time of the 2000 City Council meeting, all of the construction was *fait accompli*, and there were new council members who lacked the history, so the process was even smoother for MSCE. A review of the record reflects **no discussion or analysis of "rough proportionality" by the City Council whatsoever.**

The City Council again merely "rubber stamped" MSCE's effort to seek the additional $696,905.66 for right-of-way acquisition [App.-3, 467-68] plus various other charges for a grand total of $1,543,550.18 – all at a time when Abrams had no development application pending or even contemplated.

Despite the trial court's prior ruling, as affirmed by the Court of Appeal, that "proportionality" should be evaluated, the trial court in this instance merely accepted the seemingly plausible, yet erroneous assumption that "proportionality" could be determined without any comparison.

The upshot is that Abrams unfairly got saddled with paying for public improvements to meet the demands created by "that whole area up in back" and by MSCE's shopping center expansion. That is what the United States Supreme Court has said twice in the recent era is unconstitutional, what the Court of Appeal previously congratulated the trial court for recognizing in case number D029343, but which the trial court ultimately somehow forgot.

The effect of all of this is to put Abrams into a position where the dollars Abrams originally received for the taking of his property will go entirely back to the City. It is the same as if the City had just taken his property without compensation in the first instance.

CONCLUSION

The effect of the Judgment in this case is to enable City to steal over two acres of Abrams' property for the benefit of MSCE and others, without paying for it.

As soon as City abandoned all effort to compare the relative benefit of Westview Parkway and Galvin Avenue to Abrams' property with that of all others with access to same, it violated Abrams' constitutional rights to be free from a taking of their property without compensation.

This Court previously recognized that a failure to make a fair determination of proportionality violated the law.

The trial court's decision to accept a purported analysis of "proportionality" that did not require a comparison of relative benefit, compounded City's violation of Abrams' constitutional rights under the *Nollan-Dolan* doctrine.

That Judgment was in error, since there is no evidence in the record of any analysis of proportionality except the continued use of the "unfounded allocation presumption" and a subsequent assumption of enhancement of the gross value of Abrams' property, both of which are, themselves, contrary to law.

In any event, the over-arching mandates of the *Nollan-Dolan* doctrine from the United States Supreme Court, embraced by the California Supreme Court in *Ehrlich*, *supra*, forbid the practices employed by City.

A decade of litigation over this point is long enough. City has had three turns at bat, and on each occasion has missed as wildly as a batter trying to hit a Trevor Hoffman change-up for the first time. Remand will do no good, and at this stage is punitive to Abrams.

The Judgment should be reversed, with instructions to the trial court to enter Judgment striking the assessment in question.

Dated: January 2, 2002

Respectfully submitted,

LAW OFFICES OF LOUIS E. GOEBEL

By: /s/ Louis E. Goebel
Louis E. Goebel
Attorney for Appellants
Clem Abrams and John Bohannon

* * *

APPENDIX G

4 Civil D038402

COURT OF APPEAL, STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION ONE

CLEM ABRAMS, *et al.*, Petitioners and Appellants, v. CITY OF SAN DIEGO, Respondent.	No. 4 Civil D038402 (San Diego County Superior Court Case No. 655468)
MESA SHOPPING CENTER EAST, Real Party in Interest and Respondent.	

APPELLANTS' REPLY BRIEF

(Filed Apr. 30, 2002)

Appeal from the Judgment of the
Superior Court of California
County of San Diego
Hon. Wayne L. Peterson

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* * *

APPELLANTS' REPLY BRIEF

INTRODUCTION

There are three fundamental points at risk of being lost in the briefing in this case.

The first is that Respondent City of San Diego (hereinafter "City") has an ethic of charging property owners for purported improvements to their property without their consent so as to avoid having the general public pay, even though a substantial beneficiary of such improvements is the public at large, as opposed to the property owner from whom the exaction is extracted.

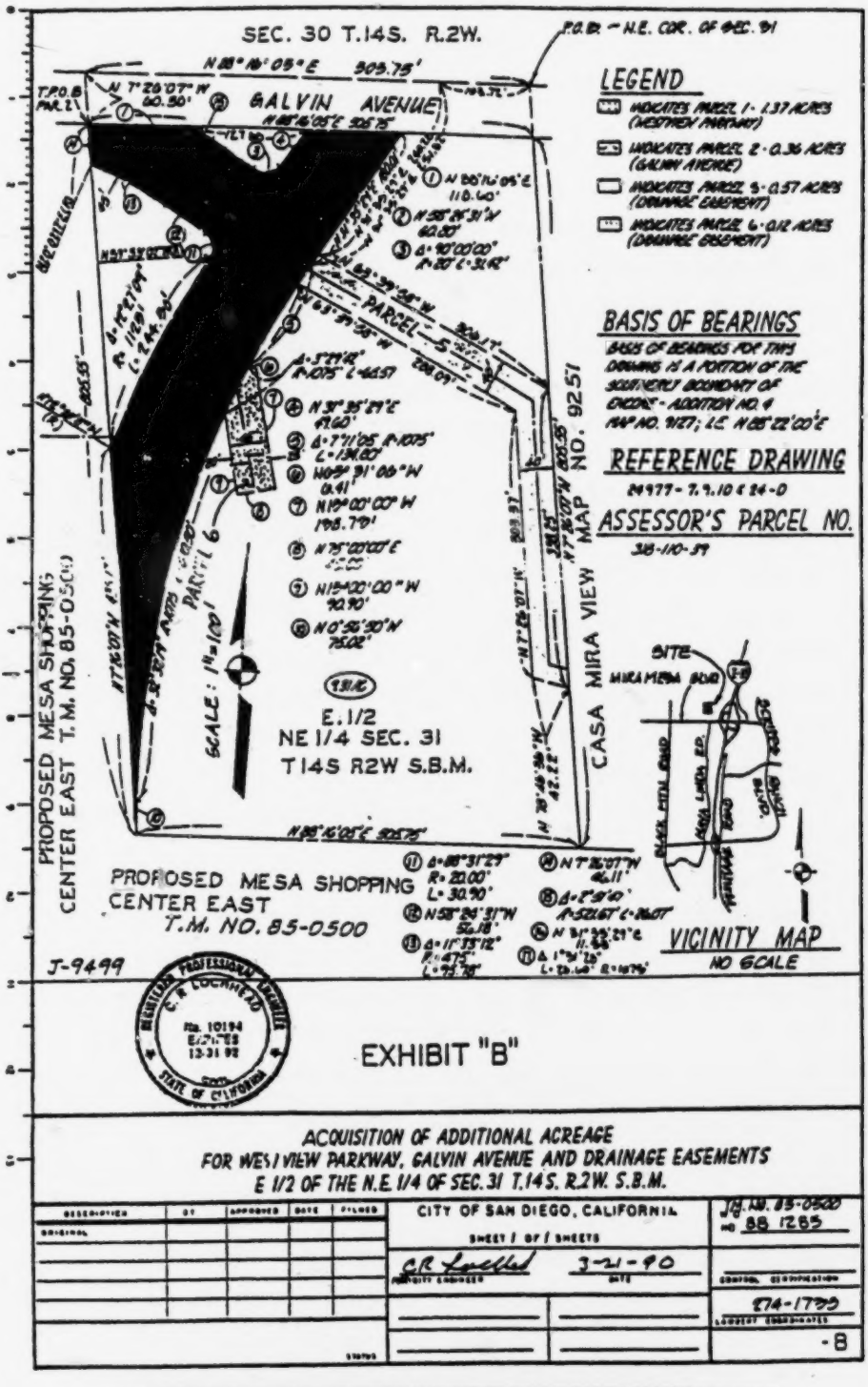
This is manifested in an approach which either extracts dedications in exchange for development permits, or, as in this case, purports to follow state and federal constitutional law by condemning a road right-of-way and paying just compensation for it, but then claiming, rightly or wrongly, that the very same property owner who has lost such right-of-way has somehow received a "benefit" of a value precisely equal to the cost of right-of-way acquisition and improvement of the road.

This approach is apparently now so basic to road improvement and maintenance analysis in San Diego that it does not even occur to the City that the net effect of it is to take property without compensation. That fact is patent from the City's Respondent Brief, which completely ignores the fact, demonstrated in the opening brief, that Westview Parkway does not merely serve the landowners adjacent to the project, but also many other users to the north.

An additional aspect of this is that nowhere in the record is there any analysis on behalf of either City or

Real Party in interest MESA SHOPPING CENTER EAST ("Real Party MSCE") which supports proportional benefit related to the last increment of assessment, which is clearly what is at issue here.

The drawing below, found at page 128 of the Administrative Record in case number D029343, provided Item 23 of Volume I of the Appendix to Appellant's Opening Brief in that case, and also at page 714 of Volume III of the Appendix to Appellant's Opening Brief in that case and incorporated into the Record on Appeal in this case, accurately depicts, in the black area, the dramatic taking of road right of way from Property Owners that occurred in this case.


SEC. 30 T.14S. R.2W.
P.O.B. = N.E. COR. OF SEC. 31
N 88° 16' 05" E 909.75'
GALVIN AVENUE
N 88°16'05" E 905.75'
T.P.O.B. PAR. 2
N 1° 28' 07" W 60.50'
LEGEND
INDICATES PARCEL 1 - 1.37 ACRES (WESTVIEW PARKWAY)
INDICATES PARCEL 2 - 0.36 ACRES (GALVIN AVENUE)
INDICATES PARCEL 3 - 0.57 ACRES (DRAINAGE EASEMENT)
INDICATES PARCEL 4 - 0.12 ACRES (DRAINAGE EASEMENT)
BASIS OF BEARINGS
BASIS OF BEARINGS FOR THIS DRAWING IS A PORTION OF THE SOUTHERLY BOUNDARY OF ENCINA - ADDITION NO. 4 MAP NO. 9127; I.E. N 88° 22' 00" E
REFERENCE DRAWING
24977 - 7, 9, 10 & 24-D
ASSESSOR'S PARCEL NO.
338-110-39
PARCEL 5
PARCEL 6
PROPOSED MESA SHOPPING CENTER EAST T.M. NO. 85-0500
CASA MIRA VIEW MAP NO. 9251
SCALE: 1"=100'
E. 1/2 NE 1/4 SEC. 31 T14S R2W S.B.M.
PROPOSED MESA SHOPPING CENTER EAST T.M. NO. 85-0500
J-9499
SITE
MIRAMESA BLVD
I-15
SCRIPPS RANCH BLVD
BLACK MTN. RD.
POWAY RD.
VICINITY MAP
NO SCALE
REGISTERED PROFESSIONAL ENGINEER C. R. LOCKHARD No. 10194 EXP. 12-31-92 STATE OF CALIFORNIA
EXHIBIT "B"
ACQUISITION OF ADDITIONAL ACREAGE
FOR WESTVIEW PARKWAY, GALVIN AVENUE AND DRAINAGE EASEMENTS
E 1/2 OF THE N.E. 1/4 OF SEC. 31 T.14S. R.2W. S.B.M.
CITY OF SAN DIEGO, CALIFORNIA
SHEET 1 OF 1 SHEETS
C.R. Lockhard 3-21-90
DESIGNED BY DATE
J.O. NO. 85-0500
WO 88 1285
274-1799
-8

BEST AVAILABLE COPY

As the Court can see, it does not skirt the edge of the property, but rather trisects it into three pieces. The great bulk of the third assessment represented the cost of acquisition of the black area from Property Owner, the first two increments being for the improvements which City and Real Party MSCE now claim enhanced the value of Property Owners' property. It should be obvious to the Court that none of this right-of-way directly benefitted Property Owners, but rather such was entirely for the benefit of others, be they Real Party MSCE or the public.

However, rather than following the mandate of the prior Court of Appeal and discuss rough proportionality as to the third exaction, both City and Real Party MSCE take the entire $1,543,000 assessment and compare it to a theoretical enhancement in value of the Abrams property, and claim that there is proportional benefit. An honest review of the record shows that the City Council reviewed no analysis that showed whether or not the third, $545,000.00 increment, as opposed to the whole $1,543,000.00 assessment, benefitted the Abrams property. The only legitimate inference to be made from the record is that because all of the factors that give rise to the appraiser's opinion of theoretical enhancement of value are based on work attributable to the first two assessments, any assertion by City or Real Party MSCE of proportional benefit to Abrams from the third assessment, which is intended to reimburse nothing other than the roadway through Appellant's property, is simply inaccurate.

As a second matter, this is a case where there was and is **no evidence whatsoever** that Abrams ever applied to develop their property. This fact makes the imposition of some $1.5 million in liens, particularly the last

$545,000.00, on their property even more egregious than any of the state and federal cases that have questioned or nullified "exactions" that were imposed as conditions of development or improvement of property This factor also completely nullifies the assumption, based on a requirement of the previous Opinion by this Court, that the Abrams property was "benefitted". The effect of the City's action in this case is, ultimately, to prevent Abrams from developing their property for twenty years.

It might make general sense to suggest that by deciding to develop a shopping center which would create traffic impacts, to the extent those impacts result in the necessity of new roads, the developer should share in the cost of such new roads, in a fair way that balances those impacts with use by the general public. Here, the record is clear that the roads in question serve many others, hence it is completely unfair to claim that properties bordering the road should pay the full cost of the road as it passes through (or in this case, at least trisects) their property.

The third point is that the law upon which City apparently relies for its policy that it can take real property, either adjoining existing roads or that is part of the right of way of a new road, without compensating the owner [*Cogan v. City of Los Angeles* (1973) 34 Cal.App.3d 515 and *White v. County of San Diego* (1980) 26 Cal.3d 897] predate, and have been abrogated by, *Nollan v. California Coastal Commission* (1987) 483 U.S. 825, *Dolan v. City of Tigard* (1994) 512 U.S. 374, and *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854.

In sum, this is the case where the Court should tell the City of San Diego once again that its current approach is unacceptable and just like it treats its citizens who

approach the podium at public hearings, the Court should say loud and clear "Your time is up, your turn is over, the third assessment is stricken as unconstitutional!"

I. THE LAW UPON WHICH CITY RELIES TO SUPPORT ITS CONFISCATION OF RIGHTS OF WAY IS OBSOLETE.

City correctly notes that there were two assessments based on a formula that was determined before 1992. City incorrectly argues that this formula remained correct.

City entirely ignores the fact that rather than proceeding along the edge of the Abrams property, as is customary, City, at the behest of Real Party MSCE, put the entire right of way of the road through the middle of the Abrams property. Respondents ignore the fact that all benefits to the Abrams property resulting from the reimbursement district had already occurred through the first two exactions, the third being only for the road **through**, as opposed to **up to** Abrams property, such through road being of no benefit to Abrams. City also entirely ignores any public benefit that would result from the construction of these roads, in direct conflict with the traffic studies and earlier City Council analysis.

Separate and apart from the obsolescence of such cases due to subsequent United States and California appellate court decisions, is the fact that City put the **entire** right of way on the Abrams property (in the absence of any development application by Abrams), a factor that clearly distinguishes this case from *Cogan v. City of Los Angeles* (1973) 34 Cal.App.3d 515 and *White v. County of San Diego* (1980) 26 Cal.3d 897.

In *Cogan v. City of Los Angeles, supra*, 34 Cal.App.3d 515 the City of Los Angeles decided to widen Reseda Avenue and call it Reseda Boulevard. Cogan's property fronted Reseda Avenue, which had irregular sidelines because some properties had been developed with apartment buildings and some, like Ugan's had not. The Court of Appeal affirmed a dedication requirement of a strip along the edge of Cogan's property, based on the law in existence at the time. In that case, a significant portion of the construction cost of the road came from public gas tax funds, such that Cogan's assessment was approximately equal to the acquisition cost of the strip of land on the edge of his property. It should be noted that in that case, even though the Court of Appeal affirmed the assessment, it noted, at 521:

> It has long been held that an arbitrary, fixed policy of assessment back to the landowner without consideration of benefits on an individual basis is invalid, and a denial of due process to the landowner. (*Norwood v. Baker*, 172 U.S. 269 [43 L.Ed. 443, 19 S.Ct. 187]; *Spring Street Co. v. City of Los Angeles*, cited *supra; Dumas v. City of Sunnyvale*, 231 Cal.App.2d 796, 800 [42 Cal.Rptr. 302]; *City of Plymouth v. Superior Court*, 8 Cal.App.3d 454, 464 [96 Cal.Rptr. 636].)

That is exactly what has happened here.

Similarly, in *White v. County of San Diego* (1980) 26 Cal.3d 897, another case where road widening was partially financed by public funds, the California Supreme Court noted, at 909:

> The present case differs from *Spring Street* [*Spring Street Co. v. City of Los Angeles* (1915) 170 Cal. 24] in at least three respects. First,

there is no showing here of substantial disparity between the values of the rights-of-way taken from each parcel comparable to the showing in Spring Street of major differences between values of corner and mid-block lots. Here nothing appears to have made it unreasonable for the county to assume that the strips taken all would have substantially the same value in proportion to length, which varied directly with the parcel's frontage on the road.

A second difference from *Spring Street* is that the present assessments are based on amounts paid for land only and exclude items such as compensation for improvements and severance damage, which were included in the Spring Street assessments despite their irrelevancy as a measure of benefit.

In *Spring Street Co. v. City of Los Angeles* (1915) 170 Cal. 24, assessments for the widening of Eighth Street in Los Angeles were imposed against each abutting lot in the exact amount of a judgment awarded its owner in an action to condemn a five-foot strip for the project. Assessments on that basis were ordered in lieu of proposed assessments based on board-of-public-works estimates of the benefit each lot would receive. The condemnation awards and thus the assessments reflected the substantially greater worth of corner lots arising from their business frontage on important cross-streets in contrast to the proposed assessments, which were based on a determination that lots in the middle of blocks would receive proportionately greater benefit because of their exclusive dependence on the street being widened. The California Supreme Court invalidated the assessments, declaring that "the compensating benefit to the property owner is . . . the sole warrant . . . for . . . the burdens of

these special assessments. . . . [T]he outermost bound of law and reason . . . has been reached and passed by the assessment in this case." (170 Cal. at pp. 30-31.) Characterizing the assessment as "manifestly and . . . grossly unjust" (170 Cal. at p. 31), the court held that the city council's action was not conclusive and continued: "[S]till further we hold that the record here presented furnishes convincing evidence that the assessment was ordered prepared without the slightest exercise of judicial discretion, and so unwarrantedly, arbitrarily, and unjustly, as to work a confiscation of the property and to be, therefore, in no legal sense an assessment at all." (170 CAL at p. 32) How prescient, given *Nollan, Dolan*, and *Ehrlich*.

In *Ehrlich v. City of Culver City, supra*, 12 Cal.4th 854, the California Supreme Court summarized the current law this way, at 859:

> As we explain, we conclude that the tests formulated by the high court in its *Dolan* and *Nollan* opinions for determining whether a compensable regulatory taking has occurred under the takings clause of the Fifth Amendment to the federal Constitution apply, under the circumstances of this case, to the monetary exaction imposed by Culver City as a condition of approving plaintiff's request that the real property in suit be rezoned to permit the construction of a multi-unit residential condominium. **We thus reject the city's contention that the heightened takings clause standard formulated by the court in *Nollan* and *Dolan* applies only to cases in which the local land use authority requires the developer to dedicate real property to public use as a condition of permit approval.**

> We arrive at this conclusion not by reference to the constitutional takings clause alone, but within the statutory framework presented by the Mitigation Fee Act. (Gov. Code, § 66000 et seq.) We will conclude in this case that, in order to avoid substantial questions concerning the constitutional sufficiency of the legislative standard embodied in the act, the tests formulated by the high court in its *Dolan* and *Nollan* opinions for determining when a regulatory taking has occurred apply here to the act's requirement that the local regulatory authority demonstrate a "reasonable relationship" between the monetary exaction and the public impact of the development.
>
> We thus interpret the act's "reasonable relationship" standard, as applied to the development fee at issue in this case, as embodying the standard of review formulated by the high court in its *Nollan* and *Dolan* opinions – proof by the local permitting authority of both an "essential nexus" or relationship between the permit condition and the public impact of the proposed development, and of a **"rough proportionality" between the magnitude of the fiscal exaction and the effects of the proposed development**. (Emphasis added.)

This Court recognized this fact in the most recent opinion in this matter in case D029343, when it noted, at page 11 [App.-3, 13][1]:

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[1] Abrams specifically request [sic] the Court to consider the original Reporter's Transcripts and Appellant's Appendices from the previous two Appeals, D019566 (Appeal 1 and D029343 (Appeal 2)

(Continued on following page)

> There is no evidence in the record that the city council considered proportionality when **increasing** the reimbursement fee against Abrams's property. Abrams's attorney spoke for 15 minutes after his request for continuance was denied. The record shows no determination by the city council that the **additional** assessment was roughly proportional to benefits purportedly received by Abrams, and the city council did not identify any proposed benefit. . . . (Emphasis added.)

The administrative record before the city council does not contain any discussion of proportionality of any **increase** in the reimbursement fee (as opposed to the entire fee) and does not show that the **additional** assessment was roughly proportional to the benefits purportedly received by Abrams (or, to quote Ehrlich directly, proportional to "the effects of the proposed project." (12 Cal.4th at 859.) The logical reason for this is that any benefit that inured to the Abrams property from the reimbursement district occurred through the first two assessments, and the third assessment is not attributable to any actual benefit to the Abrams property.

In his dissent in *White*, the late Justice Mosk made the following comment, also prescient, at 910:

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pursuant to California Rules of Court rule 11(b). This would be considered "Appeal 3". Hereinafter, all references to the Reporter's Transcript will appear as "RT-Appeal number, page number". References to the Appellants' Appendix in lieu of Clerk's Transcript shall appear as "App. – Appeal number, page number".

> The county's scheme is a cynical method of automatically shifting the cost of an improvement benefitting the public onto the backs of a few landowners because of the fortuity of their location. Not only do the landowners lose a portion of their property, but they are then deprived of the constitutionally required compensation for the taking. (Cal.Const., art. I, § 19.) I strongly disapprove of this acquisitive device by which a public entity, in order to obtain private property, puts funds therefor in a landowner's pocket – and then proceeds to pick the pocket.

That is exactly what happened here with the third exaction. But, as demonstrated below, *Nollan-Dolan* and *Ehrlich* save the day and Justice Mosk's concern is alleviated. In *Ehrlich*, the California Supreme Court embraced a metaphor, similar to the one in frequent use by the United States Supreme Court, as follows: On [sic] of the central premises of the takings clause is that truly public burdens will be publicly borne . . . the *Nollan* test helps to secure that promise by assuring that the monopoly power over development permits is not illegitimately exploited by imposition of conditions that lack any logical affinity to the public impact of a particular land use. (*Ehrlich v. City of Culver City, supra*, 12 Cal.4th 854, at 876.) Please see also section II of Justice Kennard's dissent in *Ehrlich v. City of Culver City, supra*, 12 Cal.4th 854, at 905-906.

II. THE CITY'S PROPORTIONALITY ANALYSIS IS FLAWED IN THREE FATAL RESPECTS.

At page 15 of its Respondent Brief, City attacks Abrams' description of what should be required for a showing of proportionality, claiming it is unsupported by

law. In fact, it is supported by *Spring Street Co. v. City of Los Angeles* (1915) 170 Cal. 24, *Nollan v. California Coastal Commission* (1987) 483 U.S. 825, *Dolan v. City of Tigard* (1994) 512 U.S. 374, and *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854.

A. City's approach of estimated increase in market value of the Abrams property, standing alone, is unsupported in the law, and fails to isolate the third assessment, which is the one at issue in this case.

A review of the record shows that the sole basis for the finding of benefit to Appellant was the opinion of Randy Tagg, an appraiser, that the property had been enhanced in value by $2,000,000.00 by the totality of the improvements including both the prior two assessments and the second increase, without segregating one from another. [App.-3, 503]

City offers no legal authority to support the proposition that an appraisal opinion indicating an enhancement of market value of the Abrams property alone is a sufficient basis for a finding of rough proportionality, much less one which does not isolate the amount in controversy. City also offers a lengthy description of purported physical enhancements to the Abrams property at pages 17 to 24 of its Respondent's Brief which completely ignores the fact that the some $998,000.00 of assessment that relates to such improvements remains on the Abrams property and is not being challenged here.

City offers no appraisal opinion that the value of the Abrams property was enhanced by $2,000,000.00, or for that matter, any amount whatsoever, by the condemnation

and taking of the road right of way through the middle of it. Logic would dictate that from an access standpoint, only that portion of the road that leads up to, but does not cross the Abrams property would arguably be an enhancement to the value, and that portion of the road was already subsumed in the prior assessments, which remain in effect.

This new assessment was for the sole purpose of constructing the very portion of the road that trisected the Abrams property. This additional increment benefitted only the properties to the north of the Abrams property, including the general public, but did not benefit the Abrams property at all.

B. The City's position that rough proportionality of benefit from a road can be determined without a traffic survey makes no sense.

City argues, at 26, that it need not consider traffic surveys in its determination of rough proportionality, taking the position that the prior opinion of this Court did not require such. Abrams submit that the prior opinion of this Court did not give any specific prescription or formula for the determination of rough proportionality. One would think logically, however, that a comparison of street usage between the subject properties, the properties in the district, and the general public would be necessary for any determination of proportionality. *Dolan* and *Ehrlich*, both binding on this Court as the supreme law, stand in the way of such nonsense. How else would City satisfy the mandate of *Ehrlich*: ". . . proof by the [City] . . . of a 'rough proportionality' between the magnitude of the fiscal

exaction and **the effects of the proposed development.**" (*Ehrlich v. City of Culver City, supra*, 12 Cal.4th 854, at 859, emphasis added.)

City's assertion, at page 28, that all property owners along Westview Parkway were treated equitably is simply false, for two reasons:

First, the analysis at page 29 regarding the relative dedications/assessments for Mira Mesa Boulevard, Westview Parkway, and Galvin Avenue are misleading, both because the improvements other than those trisecting the Abrams property had already been included in the prior $998,000.00 assessment, and because it tortures the analysis of *White v. County of San Diego, supra*, 26 Cal.3d 897, however dated, by assuming that a full right of way is the same as frontage.

Similarly, the analysis at page 30 about access by the Abrams property from Westview Parkway to Black Mountain Road and any value attributable thereto is entirely speculation. Logic would dictate that under current zoning, any upzoning being entirely speculative, an 87 unit apartment building would access from Mira Mesa Boulevard, and that access to the Abrams property was already included in the earlier assessments.

C. <u>The City misdescribes the effect of the third assessment with respect to access to the Abrams property</u>.

At page 31 of its Respondent's Brief, City asserts that Abrams has not been assessed for the portion of Westview Parkway providing for local traffic movement, contending that Abrams has only been assessed for the portion of the street that accesses their property. This is simply false.

The record reflects that the reason for the third assessment is because Abrams refused to allow City to take a wide cross-shaped swath out of the middle of their property for use by others without paying for it. Please see the drawing at page 2 of this brief for an accurate depiction of same. The rest of the project was in place and Abrams were already assessed for it. The additional $545,000.00+ that is the subject of this action is attributable only to the wide swath taken out of the middle of the Abrams property, which was and is not an enhancement of value, and, more importantly, is not "access" to the Abrams property.

If City were to be candid about the effect of traffic analysis on this situation the fact would be that the Abrams property should only have been assessed the portion of the cost of Westview Parkway leading up to it, based on the proportion its potential use in vehicle trips compares to the total use in vehicle trips by both the other participants in the assessment district and the general public. The record shows absolutely no effort to do this.

This failure is a fundamental, egregious ongoing constitutional flaw in the City's right of way acquisition and improvement process that continues to cry out for judicial adjustment.

III. THE PRIOR CONFUSION BETWEEN *WHITE* AND *EHRLICH* – BETWEEN "BENEFIT" AND "THE EFFECTS OF THE PROPOSED DEVELOPMENT" SHOULD NOT CONFUSE THIS COURT NOW.

Abrams has herein addressed City's "benefit" argument and fatally destroyed it as well, even though

fundamentally, this Court's slippage into the "benefit" terminology at page 10 of its March 6, 2000 Opinion is not faithful to the mandates of *Dolan, supra*, or even *Ehrlich, supra*. This Court accurately **quoted** the *Ehrlich* mandate at the bottom of page 9 and the top of page 10 of the March 6, 2000 Opinion [App.-3, 11-12] as ". . . agency must prove . . . a 'rough proportionality' between the magnitude of the fiscal exaction and the effects of the proposed development," and then without explanation segued to the outdated "benefit" language of the abrogated *White* case.

While it does not appear that *White* was expressly disapproved, in *Ehrlich*, the California Supreme Court embraced the Supremacy Clause (Article VI of the United States Constitution) as never before in land use matters, and the supremacy of *Nollan-Dolan* is beyond doubt.

Similarly, this Court apparently mixed *White* with *Ehrlich* in regard to the standard of review. Without citation to *Ehrlich*, this Court, in its March 6, 2000 Opinion, affirmed the trial court's "substantial evidence" standard. No harm, no foul, as this Court affirmed the Judgment in favor of Abrams anyway. But, in this new appeal, the Court should carefully note that *Ehrlich* held ". . . when [government] imposes special, discretionary permit conditions on development by individual property owners . . . *Nollan* and *Dolan* require that such conditions, whether they consist of possessory dedications or monetary exactions, be scrutinized under the heightened standard." (*Ehrlich v. City of Culver City, supra*, 12 Cal.4th 854, at 881.) Please see also *Id.*, at 876.

CONCLUSION

The effect of the Judgment in this case is to enable City to steal over two acres of Abrams' property, entirely for the benefit of MSCE and others, without paying for it. Respondents' respective briefs do not mitigate this unavoidable fact.

As soon as City abandoned all effort to compare the relative benefit of Westview Parkway and Galvin Avenue to Abrams' property with that of all others with access to same, relative to the third exaction as opposed to the full assessment, it violated Abrams' constitutional rights to be free from a taking of their property without compensation. This Court previously recognized that a failure to make a fair determination of proportionality when **increasing** the reimbursement fee by the **additional assessment** violated the law. (Court of Appeal Opinion dated March 6, 2000, at page 11 [App.-3, 13])

The trial court's decision to accept a purported analysis of "proportionality" that did not require a comparison of relative benefit, or of benefit of the fees attributable to the additional exaction at all, compounded City's violation of Abrams' constitutional rights under the *Nollan-Dolan* doctrine.

That Judgment was in error, since there is no evidence in the record of any analysis of proportionality except the continued use of the "unfounded allocation presumption" and a subsequent assumption of enhancement of the gross value of Abrams' property based on all three exactions, both of which are, themselves, contrary to law.

The Judgment should be reversed and the Superior Court should require Respondent City of San Diego to rescind the third exaction, since it was not, is not, and cannot be based on any evidence that satisfies the "rough proportionality" mandates of the United States Constitution as interpreted by the *Nollan-Dolan* doctrine.

Dated: April 30, 2002

Respectfully submitted,
LAW OFFICES
OF LOUIS E. GOEBEL

By: /s/ Louis E. Goebel
Louis E. Goebel,
Attorney for
Appellants CLEM
ABRAMS and
JOHN BOHANNON

* * *

APPENDIX H

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

CLEM ABRAMS, *et al*, Petitioners and Appellants, v. CITY OF SAN DIEGO, Respondent,	) No. 4 Civil D038402) (San Diego County) Superior Court Case) No. 655468)
MESA SHOPPING CENTER EAST, Real Party in Interest and Respondent.	)

PETITION FOR REVIEW

(Filed Dec. 6, 2002)

On Appeal from the Judgment of the
Superior Court of California
County of San Diego
Hon. Wayne L. Peterson

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Attorneys for Petitioners and Appellants
CLEM ABRAMS and
JOHN BOHANNON

* * *

TO: THE HONORABLE RONALD GEORGE, CHIEF JUSTICE OF CALIFORNIA, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA

Petitioners and Appellants Clem Abrams and John Bohannon (hereinafter "Appellant Property Owners") hereby petition for review of the decision of the Court of Appeal of the State of California, Fourth Appellate District, Division One, filed in this action on October 29, 2002, affirming the Judgment of the Superior Court of California, County of San Diego, denying Mandamus relief to Appellant Property Owners.

The Court of Appeal's Slip Opinion is attached hereto as Appendix A.

GROUNDS FOR REVIEW

Review of the Court of Appeal Slip Opinion is required under California Rule of Court, Rule 29(a), in order to resolve important issues of statewide concern and secure uniformity of decision as to the question of whether a public agency can exercise eminent domain powers to take real property interests, and then "assess" back the acquisition cost to the property owner as a "benefit," based on the obsolete case of *White v. County of San Diego* (1980) 26 Cal.3d 897, thereby taking real property without compensation. The Slip Opinion is contumacious of settled Federal and State Constitutional principles, including those mandated by *Dolan/Nollan* [*Dolan v. City of Tigard* (1994) 512 U.S. 374 and *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854.]

More than one Justice of the United States Supreme Court has been heard to question the compliance of the California State Courts with the Fifth Amendment "takings" jurisprudence the High Court has devised in several seminal cases, particularly, *Dolan*, *supra*. This Court acknowledged the supremacy of such holdings in its *Ehrlich* opinion, *supra*.

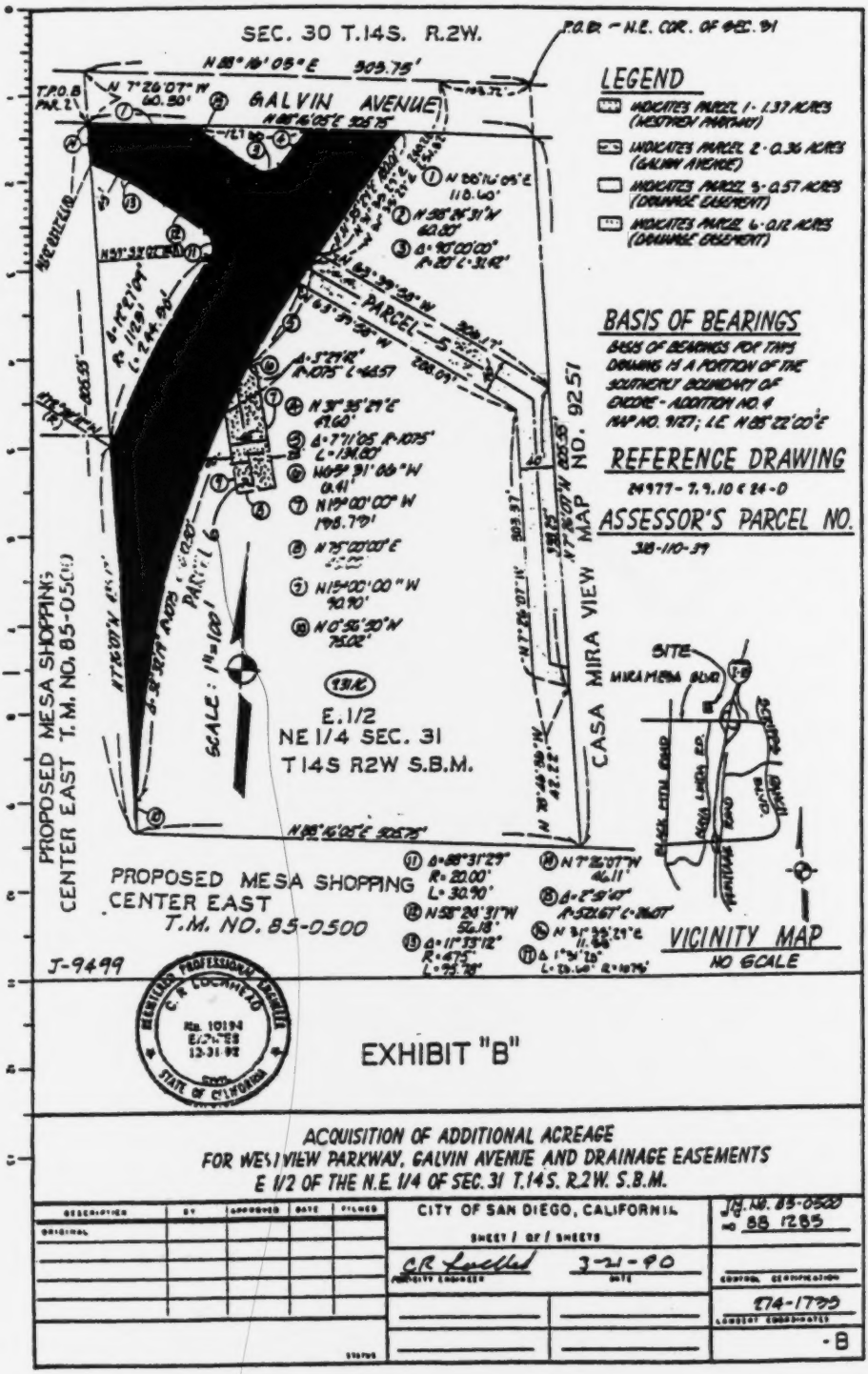
Now, in this case, a California Court of Appeal has spurned the High Court's teachings (even though its error was clearly brought to its attention.) This case is then a "poster child' for the unease already voiced by the High (Court without focusing on one specific case.

This Court has a duty and an obligation to right the wrong, thereby assuring the High Court that the application and supremacy of its property rights edicts are in fact being honored in California, and thereby forestalling yet another California property rights case from reaching the docket of the High Court.

PROLOGUE

As the old saying goes, "a picture is worth a thousand words."

This drawing accurately depicts, in the black area, the dramatic taking, ultimately without compensation, of road right of way from Appellant Property Owners that occurred in this case.


SEC. 30 T.14S. R.2W.
P.O.B. - N.E. COR. OF SEC. 31
N 88° 16' 05" E 909.75'
GALVIN AVENUE
N 88°16'05" E 925.75'
T.P.O.B PAR. 2
N 7° 26' 07" W 60.30'
LEGEND
INDICATES PARCEL 1 - 1.37 ACRES (WESTVIEW PARKWAY)
INDICATES PARCEL 2 - 0.36 ACRES (GALVIN AVENUE)
INDICATES PARCEL 3 - 0.57 ACRES (DRAINAGE EASEMENT)
INDICATES PARCEL 4 - 0.12 ACRES (DRAINAGE EASEMENT)
BASIS OF BEARINGS
BASIS OF BEARINGS FOR THIS DRAWING IS A PORTION OF THE SOUTHERLY BOUNDARY OF ENCINO - ADDITION NO. 4 MAP NO. 9127; I.E. N 85° 22' 00" E
REFERENCE DRAWING
24977 - 7.9.10 & 24-D
ASSESSOR'S PARCEL NO.
318-110-39
PARCEL 1
PARCEL 5
PARCEL 6
PROPOSED MESA SHOPPING CENTER EAST T.M. NO. 85-0500
CASA MIRA VIEW MAP NO. 9251
SCALE: 1" = 100'
E. 1/2 NE 1/4 SEC. 31 T14S R2W S.B.M.
PROPOSED MESA SHOPPING CENTER EAST T.M. NO. 85-0500
SITE
MIRA MESA BLVD
VICINITY MAP
NO SCALE
J-9499
EXHIBIT "B"
ACQUISITION OF ADDITIONAL ACREAGE
FOR WESTVIEW PARKWAY, GALVIN AVENUE AND DRAINAGE EASEMENTS
E 1/2 OF THE N.E. 1/4 OF SEC. 31 T.14S. R.2W. S.B.M.
CITY OF SAN DIEGO, CALIFORNIA
SHEET 1 OF 1 SHEETS
C.R. Lucchesi
3-21-90
T.M. NO. 85-0500
874-1799
-8

BEST AVAILABLE COPY

As the Court can see, it does not skirt the edge of the property, but rather trisects it into three pieces. It should be obvious to the Court that none of this right-of-way directly benefitted Property Owners, but rather such was entirely for the benefit of others, be they Real Party MSCE or the public.[1] Despite this, the Court of Appeal affirmed resort to *White v. County of San Diego* (1980) 26 Cal.3d 897 as a basis for commandeering "right-of-way" and then assessing back its cost, based on a theory that this roadway "benefitted" the property.

The unpublished Opinion in this case creates new (but wrong) law in four fundamental respects:

- At page 12, the Opinion states "the *Dolan/Nollan* [*Dolan v. City of Tigard* (1994) 512 U.S. 374/*Nollan v. California Coastal Commission* (1987) 483 U.S. 825] test requires that the assessment be roughly proportional to the **benefit** received by the property." (Emphasis added) There is no previous decisional law support for this conclusion. The Opinion effectively concedes [sic] is made up [sic] the new rule.

- At page 14, the Opinion states "Because Abrams' timely-filed petitions challenged only the June 1992 *increase* in the amount of the costs reimbursement . . . he effectively waived any argument that those district improvements did not benefit his property or were otherwise proper." Again, there is no previous decisional law support for the conclusion that if the initial

[1] This drawing is found at page 128 of the Administrative Record in case number D029343, provided Item 23 of Volume I of the Appendix to Appellant's Opening Brief in that case, and also at page 714 of Volume III the Appendix to Appellant's Opening Brief in that case and which is incorporated into the Record on Appeal in this case.

assessment is not challenged, the public agency has *carte blanche* to make whatever project changes and further assessments it deems appropriate. In this case, the project was changed after the first two assessments to shift the burden of the right-of-way entirely onto Appellants. Both *Dolan* and *Ehrlich* deal with each separate assessment individually.

- At page 17, the Opinion, in reference to the City's reference to the Tagg Appraisal and the Foamier report, states "In so doing, City made the required individualized determination regarding the degree of connection between the exaction imposed (e.g., the cost reimbursement lien) and the projected impact (e.g., benefit to Abrams property) of the district improvements" citing *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, 879-880; and *Dolan v. City of Tigard* (1994) 512 U.S. 374, at 391, 395-96. Appellants submit that any financial "benefit" attributable to the right-of-way acquisition was properly the subject of the eminent domain action, such that any such analysis had already been waived by the earlier settlement. Moreover, neither *Dolan* nor *Ehrlich* mandate the unilateral use of appraisal opinions as a basis for exactions.

- The Opinion states, at 18, that "City was not required to apply the rough proportionality test based on evidence regarding current and/or projected vehicle traffic on Westview Parkway and Galvin Avenue" noting that Appellants did not cite any case law supporting the idea that rough proportionality of exaction should be based on relative use of the improvements for which the exaction is made. However, neither the Opinion nor the briefing by City or Real Party provide any previous decisional authority that contradicts this view, and, in fact, it demonstrates misapplication of City policy 200-1 at footnote 8, which distinguishes between types of uses of road improvements.

In sum, the Opinion creates a four pronged San Diego specific body of new law that allows government agencies to take rights-of-way for major thoroughfares without compensation in a manner repugnant to the *Dolan/Nollan/Ehrlich* doctrines.

BACKGROUND

This is a case where Appellant Property Owners, holders of nine acre parcel of property in the Mira Mesa area of Respondent City of San Diego ("City"), had the misfortune to be located directly adjacent to a 23.8 acre parcel owned by Real Party in Interest MSCE ("MSCE"), a shopping center developer.

Appellant Property Owners had no present intention of developing their property. MSCE, on the other hand, had immediate intentions to subdivide and develop its property, and in furtherance of that goal sought to obtain approval of a subdivision map.

Part of the subdivision map review process involved an analysis of the on site and off site physical improvements required for the project. In this case, City officials determined that Mira Mesa Boulevard needed to be widened, Galvin Avenue needed to be widened, and a new major, regional thoroughfare, ultimately called Westview Parkway, needed to be constructed.

MSCE obtained approval of its tentative subdivision map with a number of conditions which included the improvements to Mira Mesa Boulevard and Galvin Avenue, and the construction of Westview Parkway.

When the project was proposed, there were two potential alignments for Westview Parkway and Galvin

Avenue. One followed the property line between Appellant Property Owners' and MSCE's respective properties, and the alternate would be largely on Appellant Property Owners' property, consuming approximately two of the nine acres, and cutting Appellant Property Owners' property up into three pieces, one of which would abut MSCE's property, and another of which would be virtually useless because of its small size. [App.-2, 128][2]

The record contains no evidence as to why the alternative alignment was selected, but as this matter has evolved, a significant reason has become apparent.

The City of San Diego has developed a pattern of circumventing the eminent domain process for the acquisition of private real property for public use in exchange for just compensation, as contemplated in Title 7 of the California Code of Civil Procedure, sections 1230.010, *et seq.*, by either requiring dedications, or, if the person or entity from whom the property is to be taken is not a current applicant for permission to develop, by proclaiming that the property is "benefitted" by the development such that an assessment lien can be placed upon it.

In this case, the vehicle for the creation of the aforementioned assessment lien was a "cost reimbursement district," pursuant to which the City of San Diego required that the developer, MSCE, "front" the cost of the improvements, including Westview Parkway and Galvin Avenue, with the understanding that Appellant Property Owners and other property owners in the area would be required

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[2] Hereinafter, all references to the Appellants' Appendix in lieu of Clerk's Transcript shall appear as "App.-Appeal number, page number".

to "reimburse" MSCE for a portion of those costs. These reimbursements, hereinafter referred to as "exactions" would be in the form of liens on the properties, payable if any development application over $20,000.00 were submitted at any time within the next twenty years.

An additional aspect of the policies of the City of San Diego is that somewhere along the line a custom evolved, which was that it could be assumed, without further analysis, that any property that suffered a condemnation of any portion thereof for road improvements was "benefitted" by the portion of the road improvements located on that property. One could reasonably speculate this "assumption" arose from, among other things, the case of *White v. County of San Diego* (1980) 26 Cal.3d 897,[3] wherein the Supreme Court upheld an assessment against property owners on either side of Mission Gorge Road for improvements to the road consisting of widening and the installation of medians and signals. In that case, the Supreme Court specifically approved of an approach which surcharged those properties whose frontages were taken by condemnation but did not charge those properties whose owners dedicated their frontage strips.

Unfortunately, somehow officials of the City of San Diego and the land use development consultants who work with them allowed the holding in *White* to be translated into a "rule of thumb," hereinafter referred to as the

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[3] As this Brief will demonstrate, the validity of City's interpretation of the *White* case should, by now, be in serious doubt, given the holdings in *Dolan v. City of Tigard*, *supra*, 512 U.S. 374, *Nollan v. California Coastal Commission*, *supra*, 483 U.S. 825, and *Ehrlich v. City of Culver City*, *supra*, 12 Cal.4th 854.

"unfounded allocation presumption," that if real property was condemned for road purposes leaving a remainder parcel, the remainder parcel was "benefitted" to the extent of the cost of the condemnation, and the proportion of the cost allocable to the remainder parcel was that represented by the portion taken compared to the portion taken from the adjoining property.

Put another way, if the center of the new road goes down the property line between two properties, they share the cost equally, but if the road is fully on the property of one property owner, going down the edge adjacent to the other property, the property owner upon whose property the road is built bears the entire cost of site acquisition and development. This approach is not only illegal generally, but, as will be shown herein, is in direct violation of the City Council's own policy 200-1 [App.-2, 1], discussed in more detail, *infra*.

Earlier MSCE took the position that the aforementioned "unfounded allocation presumption" results in the "proportionality" required by the Fifth Amendment of the United States Constitution as described in *Dolan v. City of Tigard*, *supra*, 512 U.S. 374, *Nollan v. California Coastal Commission*, *supra*, 483 U.S. 825, and *Ehrlich v. City of Culver City*, *supra*, 12 Cal.4th 854, such that no further demonstration of proportionality need be made.

In this case, that meant that if MSCE was shrewd enough to cause the alignment of Westview Parkway and Galvin Avenue to veer entirely onto Appellant Property Owners' property, MSCE could avoid having to pay for Westview Parkway and Galvin Avenue and save the other property owners in the cost reimbursement district from sharing in this expense. The City of San Diego cooperated

fully with MSCE's plan, in violation of its own policy, number 200-1. [App.-2, 1]

In connection with MSCE's development, the MESA SHOPPING CENTER EAST COST REIMBURSEMENT DISTRICT NO. 4045 ("the DISTRICT") was purportedly formed and implemented in 1990 pursuant to San Diego Municipal Code §62.0208. [App.-3, 382, 406] This process generally permits the first developer of property to fund the construction of public improvements benefitting not only that property, but other adjoining property and to secure a claim for proportionate reimbursement from other benefitted owners, if and when they develop.

Once the project was underway, MSCE and City decided that Westview Parkway and Galvin Avenue should be entirely within the confines of Appellant Property Owners' property, resulting in a division of the property into two small parcels and one larger parcel. In July of 1990, MSCE requested that additional costs be charged to Appellant Property Owners' property, increasing their total cost to $998,299.00. [App.-3, 382] Appellant Property Owners also did not object to this first amendment, which included a budget for $200,750.00 for acquisition of right-of-way across Appellant Property Owners' property, and a budget for the installation of a major storm drain across Appellant Property Owners' property.

The effect of this was that the cost reimbursement district was formed, and "exactions," in the form of liens placed on Appellant Property Owners' property were made, first in the amount of $570,948.00 and then increased to the total amount of $998,299.00. Appellant Property Owners tolerated these first two exactions.

Appellant Property Owners had not been seeking to develop their property, so City could not use its usual tactic of requiring dedication of the road right-of-way as it passed Appellant Property Owners' property.[4] The only way City could obtain the right-of-way of Westview Parkway and Galvin Avenue that would occupy 25% of Appellant Property Owners' property, in a time frame suitable to MSCE, was to condemn it. This condemnation was fully litigated, resulting in an award of $641,358 to Appellant Property Owners. [App.-3, 443]

In June 1992, City held a hearing on the increased cost and its allocation among the Appellant Property Owners. Appellant Property Owners opposed the proposed increase by letter and at the hearing. At the hearing, Appellant Property Owners sought a continuance which was denied, and, after a fifteen minute presentation, the city council, with one dissenting vote, approved the third cost reimbursement assessment against Appellant Property Owners. [App.-3, 443-44]

Appellant Property Owners therefore sought a Writ of Mandate, for the purpose of causing City Council to conduct a full and fair hearing as to the issue of whether Appellant Property Owners were being liened to an extent disproportionate to the benefit their property obtained from the improvements that are the subject of the "cost reimbursement district." [App.-3, 444]

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[4] Such a dedication would not have passed constitutional muster in any event, given the ultimate alignment the CITY chose for the road, which was entirely inside the property and consumed approximately 25% of its area.

Ultimately, the trial court disagreed with City's approach as to proportionality, ruling that it was up to City of San Diego to demonstrate a factually sustainable proportionality between the effects of the increased costs of $545,251.18 assessed through the cost reimbursement district on June 23, 1992 and the exaction with which Appellant Property Owners had taken issue. [App.-3, 444]

MSCE appealed, and this Court affirmed that determination, in case number D029343. [App.-3, 452]

The effect of the Opinion in D029343 was that City Council would be required to hold a proper hearing on the question of the proportionality of the benefits related to the exaction, so as to create a record permitting judicial review of that question, if necessary.

The Opinion stated, at 11:

> To impose a cost reimbursement lien on Abrams's property, the City must prove that an essential nexus exists between the assessment and the benefit of public improvement and that the amount of the assessment is roughly proportional to the benefit to the property of the street improvement. Because there is no evidence of proportionality, the trial court correctly determined that insubstantial evidence supported the action by the city council. [App.-3, 450]

City then scheduled another hearing on the question of the third exaction, Appellant Property Owners specifically took issue with the question of proportionality, requesting a continuance so that they could have experts present a more appropriate description of proportionality. [App.-3, 396, 457-59] This request was granted.

On June 19, 2000, the City Council held its regular meeting, which included, as item 205, "Addendum to the Mesa Shopping Center East Cost Reimbursement District Agreement" with a City Manager's recommendation to adopt a resolution "[r]e-affirming that a factually sustainable proportionality exists between the June 23, 1992 amendment to the Mesa Shopping Center East Cost Reimbursement District and the benefit to the Abrams/Bohannon property." [App.-3, 422]

Appellant Property Owners were allowed **two minutes** on the record, the transcript of which only takes up two pages, [App.-3, 425-27] and City adopted the resolution, based on a report from a "public finance consultant," (the "Fournier Report") which included a purported engineering analysis and an appraisal of the land. [App.-3, 464-596] The Fournier Report contained a purported "benefit analysis" involving only Appellant Property Owners' property, which concluded with the opinion that the value of Appellant Property Owners' property had risen based on the "improvements" hence had been benefitted. [App.-3, 471-74]

City's consultant noted that this condemnation award was $440,000.00 more than the budget as of the first amendment. This consultant, Fournier, then sums up what City did:

> Accordingly, on April 20, 1992, the cost reimbursement engineer, Wildan Associates, prepared and submitted its report regarding the final cost of improvements and right-of-way acquisition, and proposed spreading the costs that had increased from that which was estimated at the time of the first amendment to the cost reimbursement district. It had by that time been

> determined that the cost of right-of-way acquisition, including attorney's fees and other litigation expenses, was $696,905.66, of which $641,358 was the right-of-way compensation agreed to be paid and actually paid to the owners of the Abrams/Bohannon parcel. This represented a total increase of $496,000 from the estimate for right-of-way acquisition costs which was used at the time of prior amendment to the reimbursement district. **This entire amount, together with approximately $49,000 of the increase in overall improvement costs experienced by the district, was then assessed to the Abrams/Bohannon parcel by an amendment to the district passed by the City Council on June 23, 1992**. [App.-3, 467-68, emphasis added.]

At the June 19, 2000 hearing, the additional lien was approved with no record whatsoever containing an actual demonstration of any sort of calculation regarding proportionality as between the various properties benefited by the Westview Parkway and Galvin Avenue improvements. [App.-3, 424-30]

Appellant Property Owners therefore filed a Supplemental Petition for Writ of Mandate, [App.-3, 18] seeking to have the trial court tell City that it had used the wrong standard. The trial court denied the Supplemental Petition, holding:

> The Court of Appeal's Opinion does not require a calculation of the traffic that petitioners' parcel might someday generate. The better way to identify benefit is to determine what a willing buyer would pay for the property before and immediately after the improvements were constructed, as the City has done. Using this

> standard of proportionality, the record establishes a substantial evidence of proportionality. (See City's points and authorities, 18:15-19:7.) Nor has a procedural due process violation been shown. (City's points and authorities 19:22-20:4.) [App.-3, 676, 677-78]
>
> This Appeal timely followed. [App.-3, 680]

The Court of Appeal filed its unpublished Opinion in this case on October 29, 2002. That Opinion affirmed the Trial Court's decision. Appellant Property Owners filed a Petition for Rehearing which was summarily denied. A true and correct copy of the Court of Appeal Order in that regard is attached hereto as Exhibit "B".

LEGAL ISSUES PRESENTED

1. Did the Court of Appeal err, in holding, at page 12, that the *Dolan/Nollan* test requires that an assessment be roughly proportional to the **benefit** received by the property in the absence of decisional law support for such a conclusion?

2. Did the Court of Appeal err in holding, at page 14, that if an initial special assessment is not challenged by an affected property owner, the public agency has *carte blanche* to make whatever project changes and further assessments it deems appropriate, even if the project is significantly changed?

3. Did the Court of Appeal err in holding, at page 17, that a simple appraisal constitutes the required individualized determination regarding the degree of connection between the exaction imposed (e.g., the cost reimbursement lien) and the projected impact (e.g., benefit to the property owners' property) of the district improvements, citing *Ehrlich v. City of Culver City*,

supra, 12 Cal.4th 854, 879-880; and *Dolan v. City of Tigard*, *supra*, 512 U.S. 374, at 391, 395-96, when neither *Dolan* nor *Ehrlich* mandate the unilateral use of appraisal opinions as a basis for exactions?

4. Did the Court of Appeal err in holding, at page 18, that a public agency was not required to determine the existence of rough proportionality of the exaction, as required by *Dolan* and *Ehrlich* by comparing evidence regarding the level of current and/or projected public and neighboring vehicle traffic on the streets for which the right of way is taken by such public agency, as opposed to vehicle traffic attributable to the property owner's permitted use?

I. THE COURT OF APPEAL ERRED IN EQUATING "BENEFIT" WITH "ROUGH PROPORTIONALITY"

In *Ehrlich v. City of Culver City*, *supra*, 12 Cal.4th 854, the California Supreme Court summarized the current law this way, at 859:

> As we explain, we conclude that the tests formulated by the high court in its *Dolan* and *Nollan* opinions for determining whether a compensable regulatory taking has occurred under the takings clause of the Fifth Amendment to the federal Constitution apply, under the circumstances of this case, to the monetary exaction imposed by Culver City as a condition of approving plaintiff's request that the real property in suit be rezoned to permit the construction of a multi-unit residential condominium. **We thus reject the city's contention that the heightened takings clause standard formulated by the court in *Nollan* and *Dolan* applies only to cases in which the local land use authority requires**

> **the developer to dedicate real property to public use as a condition of permit approval.**
>
> We arrive at this conclusion not by reference to the constitutional takings clause alone, but within the statutory framework presented by the Mitigation Fee Act. (Gov. Code, § 66000 et seq.) We will conclude in this case that, in order to avoid substantial questions concerning the constitutional sufficiency of the legislative standard embodied in the act, the tests formulated by the high court in its *Dolan* and *Nollan* opinions for determining when a regulatory taking has occurred apply here to the act's requirement that the local regulatory authority demonstrate a "reasonable relationship" between the monetary exaction and the public impact of the development.
>
> We thus interpret the act's "reasonable relationship" standard, as applied to the development fee at issue in this case, as embodying the standard of review formulated by the high court in its *Nollan* and *Dolan* opinions – proof by the local permitting authority of both an "essential nexus" or relationship between the permit condition and the public impact of the proposed development, and of a **"rough proportionality" between the magnitude of the fiscal exaction and the effects of the proposed development**. (Emphasis added.)

The "benefit" test described at page 12 of the Opinion is simply not the same as the test described in *Ehrlich* which refers to "effects of the proposed development." The Court of Appeal made up a new rule which is not

supported by current legal authority and is flatly in conflict with *Dolan* and *Ehrlich*.

II. THE COURT OF APPEAL ERRED ON HOLDING THAT FAILURE TO OBJECT TO THE INITIAL ASSESSMENT WAIVES SUBSEQUENT OBJECTIONS TO CHANGES IN THE PROJECT OR INCREASES IN THE ASSESSMENT.

The record reflects that when the original assessment district was implemented and the first supplemental assessment was initiated, the right-of-way went alongside, as opposed to through, Appellant Property Owners' property.

However, at page 14, the Opinion states "Because Abrams' timely-filed petitions challenged only the June 1992 *increase* in the amount of the costs reimbursement . . . he effectively waived any argument that those district improvements did not benefit his property or were otherwise proper." Again, there is no previous decisional law support for the conclusion that if the initial assessment is not challenged, the public agency has *carte blanche* to make whatever project changes and further assessments it deems appropriate. In this case, the project was changed after the first two assessments to shift the burden of the right-of-way entirely onto Appellants.

The Opinion fails to account for the fact that after the second assessment, at the request of Real Party, the project was changed, to shift the right-of-way from the boundary between Real Party's and Appellants' respective properties, **entirely onto Appellant Property Owners'**

property, as depicted in the drawing incorporated into Appellants' Reply Brief.

In his dissent in *White v. County of San Diego, supra,* 26 Cal.3d 897, the late Justice Mosk made the following comment, at 910:

> The county's scheme is a cynical method of automatically shifting the cost of an improvement benefitting the public onto the backs of a few landowners because of the fortuity of their location. Not only do the landowners lose a portion of their property, but they are then deprived of the constitutionally required compensation for the taking. (Cal.Const., art. I, § 19.) I strongly disapprove of this acquisitive device by which a public entity, in order to obtain private property, puts funds therefor in a landowner's pocket – and then proceeds to pick the pocket.

That is exactly what happened here with the third exaction after the right-of-way change. *Dolan/Nollan* and *Ehrlich* appear intended to alleviate Justice Mosk's concern, but apparently not in Division One of the Fourth District.

In *Ehrlich*, the California Supreme Court embraced a metaphor, similar to the one in frequent use by the United States Supreme Court, as follows:

> One of the central premises of the takings clause is that truly public burdens will be publicly borne . . . the *Nollan* test helps to secure that promise by assuring that the monopoly power over development permits is not illegitimately exploited by imposition of conditions that lack any logical affinity to the public impact of a particular land

> use. (*Ehrlich v. City of Culver City, supra*, 12 Cal.4th 854, at 876.)

Please see also section II of Justice Kennard's dissent in *Ehrlich v. City of Culver City, supra*, 12 Cal.4th 854, at 905-906. Please see also *Armstrong v. United States* (1960) 364 U.S. 40, 49 and *Palazzolo v. Rhode Island* (2001) 533 U.S. 606, 633:

> The Fifth Amendment forbids the taking of private property for public use without just compensation. We have recognized that this constitutional guarantee is "'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Penn Central, supra*, at 123-124, 98 S.Ct. 2646 (quoting *Armstrong v. United States*, 364 U.S. 40, 49, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (1960)).

The most egregious aspect of this whole proceeding, however, is the fact that Appellant Property Owners have never been applicants for any project that would have justified taking strips out of the middle of their property "for its benefit." The decisions to shift the right-of-way rested solely with Real Party and Respondent City, which rightfully should bear the expense.

III. THE COURT OF APPEAL ERRED IN AFFIRMING THE USE OF APPRAISAL REPORTS TO DEMONSTRATE MARKET VALUE INCREASE AS A BASIS FOR A FINDING OF "BENEFIT."

At page 17, the Opinion holds that Respondent City made the required individualized determination regarding

the degree of connection between the exaction imposed (e.g., the cost reimbursement lien) and the projected impact (e.g., benefit to Appellant Property Owners property) of the district improvements, citing *Ehrlich v. City of Culver City, supra*, 12 Cal.4th 854, 879-880; and *Dolan v. City of Tigard, supra*, 512 U.S. 374, at 391, 395-96.

As an initial matter **the substitution of the word "benefit" for "effects of the development"** on the basis of the fact that Appellant Property Owners were not seeking approval of a project is entirely unsupported by any statutory or case law, and the Opinion cites none. Patently, there is and could be no honest justification for such sleight of hand when Appellants' property was seized by eminent domain, but through this ruse perpetrated by the City, Appellants were denied just compensation.

No reported case refers to, much less mandates, the the unilateral use of appraisal opinions as a basis for exactions.

A review of the record shows that the sole basis for the finding of benefit to Appellant Property Owners was the opinion of Randy Tagg, an appraiser, that the property had been enhanced in value by $2,000,000.00 by the totality of the improvements including both the prior two assessments and the second increase, without segregating one from another. [App.-3, 503]

The Opinion provides no legal authority to support the proposition that an appraisal opinion indicating an enhancement of market value of the Appellant Property Owners property alone is a sufficient basis for a finding of rough proportionality.

The Opinion beginning at page 17 entirely accepts, without question the Tagg appraisal, and entirely omits to consider that such appraisal was not grounded in the reality of an actual development proposal, as opposed to speculation as to what the City might or might not approve. Perhaps more importantly, in a normal taking case where appraisal testimony is taken, it is tested through cross-examination and the defense opinion testimony. In this case the record makes clear that there was no discussion of the sense or underpinnings of Tagg's appraisal testimony at all, since the proceedings were nothing more than a "rubber stamp" exercise.

IV. THE COURT OF APPEAL ERRED IN DECLINING TO CONSIDER THE TRAFFIC EFFECTS INVOLVED IN REAL PARTIES DEVELOPMENT AS THE PROPER LOGICAL BASIS FOR ROUGH PROPORTIONALITY ANALYSIS.

The Opinion states, at 18, that "City was not required to apply the rough proportionality test based on evidence regarding current and/or projected vehicle traffic on Westview Parkway and Galvin Avenue" noting that Appellant Property Owners did not cite any case law supporting the idea that rough proportionality of exaction should be based on relative use of the improvements for which the exaction is made.

However, neither the Opinion nor the briefing by City or Real Party provided any previous decisional authority that contradicts this view, and, in fact, the Opinion demonstrates misapplication of City policy 200-1 at footnote 8,

which distinguishes between types of uses of road improvements.

The Opinion appears to assume that the strip of Westview Parkway and Galvin Avenue that trisected Appellants' property was "the portion of the street system which provides for local traffic movement and access to abutting property" as opposed to

- Streets which facilitate the movement of through traffic, or serve in a collector function and are of benefit to the general area as to which, pursuant to Council policy number 200-1, "this community should share in the costs" or
- Features which expedite the movement of large volumes of traffic or which provide major service for other areas are of general benefit to the City which, pursuant to Council policy number 200-1, "merit funding from tax sources."

Absent consideration of a traffic study, it would not be possible for Respondent City to figure out how a road improvement should be financed. When here [sic] is doubt about the specific proportion of use between the public and the property owner, it should be in favor of public funding, not assessments of individual property owners in amounts unrelated to their use of the resulting streets.

When one compares the 696 Average Daily Trips[5] that would be attributable to the 87 maximum residential units on Appellant Property Owners' property, [App.-3, 456] with

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[5] Average Daily Trips per Dwelling Unit times the number of expected dwelling units (or other users) is the fundamental yardstick for design of circulation systems in City.

the 25,000 Average Daily Trip cap, and the 8,000 existing Average Daily Trips as of April, 1998, [App.-3, 456] the idea that 696 trips, which are, per the record, 8.7% of current, and 2.8% of projected trips should account for 100% of the right-of-way cost is absurd.

One would think logically that a comparison of street usage between the subject properties, the properties in the district, and the general public would be necessary for any determination of proportionality. The Opinion nowhere describes how City satisfies the mandate of Ehrlich: " . . . proof by the [City] . . . of a 'rough proportionality' between the magnitude of the fiscal exaction and **the *effects* of the proposed development**." (*Ehrlich v. City of Culver City*, *supra*, 12 Cal.4th 854, at 859, emphasis added.)

The Opinion itself even cites a passage from *White v. County of San Diego*, *supra*, 26 Cal.3d 897, 904 "Property may be specially assessed only for improvements that provide it benefits beyond those received by the general public." Absent consideration of traffic patterns, no legitimate determination of the benefit of a road improvement can be made, hence the Court of Appeal was entirely in error.

V. THE COURT OF APPEAL ERRED IN USING BENEFIT" AS A BASIS FOR PROPORTIONALITY DETERMINATION AS OPPOSED TO "THE EFFECTS OF THE PROPOSED DEVELOPMENT" AS MANDATED BY *EHRLICH*, RESULTING IN INJUSTICE.

The Court of Appeal's slippage into "benefit" terminology at page 10 of its earlier March 6, 2000 Opinion and in

the entirety of its October 29, 2002 Opinion is simply not faithful to the mandates of *Dolan*, *supra*, or even *Ehrlich*, *supra*. The Court of Appeal accurately **quoted** the *Ehrlich* mandate at the bottom of page 9 and the top of page 10 of the March 6, 2000 Opinion [App.-3, 11-12] as " . . . agency must prove . . . a 'rough proportionality' between the magnitude of the fiscal exaction and the **effects** of the proposed development," (emphasis added) and then without explanation segued to the outdated "benefit" language of the abrogated *White* case, which apparently has now become the foundation for the decision in the current Opinion.

While it does not appear that *White* has yet been expressly disapproved, its bald conflict with the more recent trio of cases is patent, this is the time for its demise. In *Ehrlich*, this Court embraced the Supremacy Clause (Article VI of the United States Constitution) as never before in land use matters, and the supremacy of *Dolan/Nollan* is beyond doubt.

The Opinion notes that *Ehrlich* held " . . . when [government] imposes special, discretionary permit conditions on development by individual property owners . . . *Nollan* and *Dolan* require that such conditions, whether they consist of possessory dedications or monetary exactions, be scrutinized under the heightened standard." (*Ehrlich v. City of Culver City*, *supra*, 12 Cal.4th 854, at 881.)

Despite the recitation of the heightened scrutiny standard, the Court of Appeal erroneously declined to actually apply it.

CONCLUSION

For the reasons stated above, Appellant Property Owners respectfully request this Court to vacate the Slip Opinion of the Court of Appeal, and review this matter, and reverse the Judgment of the trial court below and take such other action as is necessary to achieve uniformity of decision to prevent Respondent City, and other public agencies, from stealing rights of way consisting of both sides of a road largely intended to serve others and the general community, in violation of its own stated policies, entirely without paying property owners for it.

The Slip Opinion flat-out trashed the "real" *Dolan/Ehrlich* rough proportionality test, and replaced it with an incomplete, inaccurate, homemade so-called test, unsupported by any current legal authority, and plainly in conflict with *Dolan* and *Ehrlich* and their underlying principles and purposes. This Court should discourage such outrageous sleight-of-hand with well-settled legal principles which blatantly and deliberately undermines property owners' Federal and State Constitutional Rights.

The effect of the Opinion as it is currently framed is to confirm Respondent City's current pattern of consistently condemning property as "right-of-way" and then "assess back" the money it pays based on "benefit" in direct violation of the takings clauses of the Federal and California constitutions.

Appellants respectfully request that this Court review this decision, and acknowledge that the law of eminent domain and the Federal and State Constitutional rights of property owners are intact, such that property cannot be taken without just compensation.

Dated: December 5, 2002 Respectfully submitted,

LAW OFFICES OF LOUIS E. GOEBEL

By: /s/ Louis Goebel
Louis E. Goebel, Attorney for Appellants CLEM ABRAMS and JOHN BOHANNON

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